

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VOLUME 7 (P.M. portion)

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I N D E XDIRECT CROSS REDIRECT RECROSSWITNESSES ON BEHALF OF
THE DEFENDANT:

| | | | |
|-----------------------------------|------|------|------|
| Randall J. Cadenhead (Resumed) | | 1492 | 1500 |
| Matthew Edwin Carothers | 1505 | 1522 | |
| Christopher Thomas Rucinski | 1549 | 1592 | |

1 A F T E R N O O N S E S S I O N

2 (Jury out.)

3 THE COURT: All right. Anything before we get our
4 jury? Ms. Jobson?

5 MS. JOBSON: Yes, please. One minor housekeeping
6 issue. There were a couple of documents that came in with the
7 Sabec, the Christopher Sabec video.

8 THE COURT: Okay.

9 MS. JOBSON: We've agreed on them. I believe there's
10 no objection. I'd like to move them into evidence.

11 THE COURT: All right. Certainly.

12 MS. JOBSON: They are DTX 0387, DTX 0390, DTX 0393,
13 DTX 0395, and DTX 0396.

14 THE COURT: All right. Thank you, Ms. Jobson.
15 Do you need copies of those now?

16 THE CLERK: Me?

17 THE COURT: Yeah.

18 THE CLERK: I think I have them.

19 MS. JOBSON: I believe you have them.

20 THE COURT: Okay. All right. Good. All right.
21 Thank you. It's just different methods of putting the exhibits
22 in, and, you know, I've got concerns making sure we get the
23 record correct.

24 All right, Greg, let's get our jury.

25 (Jury present.)

R. Cadenhead - Cross

1492

1 THE COURT: I think we're missing a couple of people.
2 There we go.

3 All right. Please have a seat.

4 Mr. Kelley?

5 RANDALL J. CADENHEAD, DEFENDANTS' WITNESS,

6 PREVIOUSLY SWORN, RESUMED

7 CROSS-EXAMINATION (Cont'd.)

8 BY MR. KELLEY:

9 Q. All right. Good afternoon, Mr. Cadenhead.

10 A. Good afternoon.

11 Q. When we left off, we were talking about a series of
12 letters and e-mails that you had received from Rightscorp
13 notifying you of the ever-increasing counts of infringements
14 and repeat infringers. Do you remember that?

15 A. I do.

16 Q. Let's do one more.

17 A. Okay.

18 Q. And this is one Mr. Bridges introduced in your direct.

19 A. Yes.

20 Q. If you would pull up DTX 2094.002.

21 A. Yes.

22 Q. There we go. Sorry about that.

23 Okay. Do you have it in front of you?

24 A. Yes, sir.

25 Q. And I believe you identified this as a letter that you

R. Cadenhead - Cross

1493

1 got, or e-mail, rather --

2 A. Yes.

3 Q. -- maybe e-mail letter that you got late one night.

4 A. Yes.

5 Q. Okay. Take a look, if you would, at the second paragraph
6 of that.

7 A. Yes.

8 Q. Now, this was just the latest in a series of letters that
9 you had gotten about infringement on the Rightscorp network,
10 right?

11 A. Well, it's one of a series of e-mailed letters that I got
12 that day, yes.

13 Q. All right. Take a look -- now, we pulled this up, and
14 this is as of November 24, 2013.

15 A. Yes.

16 Q. Okay. How many notices does Rightscorp say that it sent
17 to Cox between -- I think it says between July 26, 2013, and
18 November 24, 2013?

19 A. That's in the second paragraph, and it says, "We have sent
20 1,036,902 infringement notices to you."

21 Q. And how many repeat infringers do we have?

22 A. 13,145.

23 Q. Okay. Thank you.

24 Now, with all of these various e-mails and letters
25 and stuff that we've looked at, Cox didn't investigate any of

R. Cadenhead - Cross

1494

1 the data presented in those letters about infringements taking
2 place on its network, did it?

3 A. I think I've testified to my review of the list that was
4 attached to one of the certified letters that came in.

5 Q. So other than your review, though, nothing, nothing
6 further was done with that information?

7 A. That's correct.

8 Q. And Cox didn't advise any of the subscribers identified in
9 all this data that they had been accused of copyright
10 infringement, did they?

11 A. That's correct.

12 Q. And are you aware that subscribers get sued for illegal
13 file sharing?

14 A. I am indeed.

15 Q. And, in fact, Cox gets subpoenas related to that, doesn't
16 it?

17 A. A great many.

18 Q. But Cox didn't advise any of its subscribers that were
19 identified by Rightscorp of the fact that they were potentially
20 on -- that there was a chance they were going to be sued?

21 A. We didn't process any of the notices.

22 Q. Okay. And Cox didn't use any of this information to stop
23 further infringements, did it?

24 A. We didn't process them at all.

25 Q. Right. So you didn't use it to stop further

R. Cadenhead - Cross

1495

1 infringements?

2 A. Yeah. We were still trying -- well, we were waiting for
3 Rightscorp.

4 Q. All right. Let's turn our attention now to another e-mail
5 that Mr. Bridges covered. I'm going to give you the PX
6 version. It's PX 2452. It's already been admitted.

7 A. Okay.

8 Q. And if you would, just that first page right there.

9 A. Okay.

10 Q. First of all, can you tell me -- this is kind of a
11 compendium document of e-mails. Can you tell me what was going
12 on with this?

13 A. This was part of an exchange of e-mail messages and we
14 also had some telephone conversations with Christopher Sabec in
15 the June to August timeframe of 2011.

16 Q. And so you and Mr. Sabec had some back-and-forth about the
17 notices?

18 A. Yes.

19 Q. Okay.

20 A. Actually, it started out about subpoenas to us and evolved
21 into his bringing up notices.

22 Q. All right. And this e-mail that we have pulled up here is
23 the last e-mail in the thread, or at least the thread between
24 you and Mr. Sabec?

25 A. I don't recall for sure. I'll take your word for it if

R. Cadenhead - Cross

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1 you want to go ahead.

2 Q. All right. It's not important.

3 If we can blow up the third, fourth, fifth, sixth,
4 and seventh paragraphs? I'm not sure I narrowed it down
5 terribly, but -- all right.

6 Now, in this e-mail that you received from Mr. Sabec,
7 he advised you about the notices and the fact that they, at
8 least in his opinion, constituted actual notice of illegal
9 activity; is that correct?

10 MR. BRIDGES: Your Honor, this is testimony about
11 what appears to be legal opinion expressed in a letter.

12 THE COURT: It's what Sabec is stating. It's not
13 legal. Overruled. I've already given an instruction on this.
14 I don't think we need to keep reminding the jury. Go ahead.

15 BY MR. KELLEY:

16 Q. Okay. Do you see the words "actual notice" there?

17 A. I do.

18 Q. Okay. And let's skip on down. Could you read the next
19 paragraph?

20 A. "Here is the important point for you to understand: Our
21 notices put Cox at risk of losing its safe harbor. And if Cox
22 has no safe harbor under the DMCA, then it is liable for the
23 infringements under the theory (well-tested in the courts) of
24 vicarious infringement. This is as a result of section 512(i),
25 which requires every ISP (including conduits) to have adopted

R. Cadenhead - Cross

1497

1 and implemented a policy under which repeat infringers are
2 disconnected. We are building a huge body of evidence that Cox
3 has numerous repeat infringers."

4 Q. Okay. Would you read the next paragraph?

5 A. "You can ignore the notices. The DMCA does not have
6 contain any specific requirement that you forward them."

7 Q. Okay. And then the next one?

8 A. "But you cannot not ignore section 512(i), and we intend
9 to test you on it. If you ignore the fact that repeat
10 infringers are continuing to use Cox's facilities, then Cox
11 fails the 512(i) test. Is that an outcome with which you are
12 comfortable?"

13 Q. And then there's one last paragraph there, Karl, that we
14 don't quite have up. There we go.

15 And then the final paragraph, Mr. Cadenhead, and I
16 promise this is it.

17 A. That's good.

18 "We would much prefer to work in a cooperative manner
19 with Cox, and it is easier for you if we do things that way,
20 but we will press the issue for the benefit of our copyright
21 holders."

22 Q. So did you understand from this e-mail that Rightscorp and
23 its clients intended to press Cox on taking action on the
24 notices that it had received of infringement?

25 That's what it says, doesn't it?

R. Cadenhead - Cross

1498

1 A. It says that -- it talks a lot about law, and I'm not here
2 to do that, so --

3 Q. Right. But it says that we intend to test you on it. Do
4 you see that?

5 A. "And we intend to test you on it." It does, indeed.

6 Q. And it also says, "We will press the issue for the benefit
7 of our copyright holders."

8 Does it not?

9 A. Yes.

10 Q. Now, this was a fight that Cox wanted, wasn't it?

11 A. I'm sorry?

12 Q. Didn't Cox want this fight over the notices and taking
13 care of infringement? No?

14 A. No, sir.

15 Q. All right. Let's put up PX 1392, which was admitted
16 previously. Look at the first e-mail, the last paragraph of
17 the first e-mail.

18 This is an e-mail from Jason Zabek, isn't it?

19 A. Yes.

20 Q. Read to the jury what that last paragraph says.

21 A. "I really hope they push this and threaten to sue us. We
22 have all our ducks in a row on DMCA and I would dig going to
23 court and either shoving it in their face or destroying the
24 DMCA."

25 Q. All right. Let's put up Exhibit 13 -- Plaintiff's 1315,

R. Cadenhead - Cross

1499

1 the first e-mail.

2 All right. And this is also from Mr. Zabek, isn't
3 it?

4 A. Yes. This is one I was copied on.

5 Q. Yeah.

6 A. I was on the To list.

7 Q. You anticipated my question. You were copied on this one,
8 right?

9 A. Yes, this one. I was. Thank you.

10 Q. Okay. Would you read that -- those three lines to the
11 jury?

12 A. "Roger that. I tell you, I kind of hope they do. This is
13 a fight we want. Thank you as always for your support."

14 Q. And then finally, if you would put up PX 1318, redacted?

15 Take a look at that, the first e-mail that's been
16 redacted. I'll give you a moment. They're passing one up to
17 you.

18 A. Oh, good. Thank you.

19 Q. Read the second line of that e-mail to the jury, if you
20 would.

21 A. "I say let them sue. It will be a great case for Cox. If
22 we lose, the press will still be good."

23 Q. Mr. Zabek got his wish, didn't he?

24 A. Well --

25 MR. BRIDGES: Objection, Your Honor.

R. Cadenhead - Redirect

1500

1 THE COURT: Sustained.

2 MR. KELLEY: All right. Pass the witness.

3 THE COURT: All right. Redirect?

4 REDIRECT EXAMINATION

5 BY MR. BRIDGES:

6 Q. Mr. Cadenhead --

7 A. Yes, sir.

8 Q. -- Mr. Kelley showed you a series of communications from
9 Mark McAlister, those letters with those notices attached,
10 right?

11 A. Yes.

12 Q. And he just showed you right now an e-mail that Rightscorp
13 sent on behalf of BMG in parallel with notices or e-mails sent
14 on behalf of six other copyright holders just as you were going
15 into retirement, correct?

16 A. Yes. I remember, yes.

17 Q. Before Mr. McAlister sent those letters and before the
18 e-mail that Mr. Kelley just showed you, what had Cox told
19 Rightscorp about Rightscorp's notices?

20 A. Well, we had from the very beginning communicated that
21 their notices containing demands for payment weren't
22 acceptable, nor was the fact that they were insisting on us
23 enforcing the notices by suspending or redirecting service.

24 Q. And what did Cox tell Rightscorp about what Cox would do
25 if Rightscorp took those offensive parts out of the notices?

R. Cadenhead - Redirect

1501

1 A. We told them that we would accept them and we'd work with
2 them on volume control.

3 Q. Thank you.

4 Another point: All those e-mails that Mr. Kelley
5 showed you earlier about terminations and reactivations and
6 timing and things like that, do you recall those?

7 A. I do.

8 Q. Were any of those e-mails about notices from Rightscorp?

9 A. No.

10 Q. Were any of those e-mails about the plaintiff in this
11 case, BMG?

12 A. No.

13 MR. BRIDGES: I pass the witness, Your Honor.

14 THE COURT: All right. Can Mr. Cadenhead be excused?

15 MR. KELLEY: As far as we're concerned, yes.

16 THE COURT: All right.

17 MR. BRIDGES: Yes.

18 THE COURT: Mr. Cadenhead, you're excused with our
19 thanks, sir.

20 THE WITNESS: Thank you.

21 THE COURT: And please don't discuss the testimony
22 you've given with any other fact witnesses until our trial is
23 over. And have a safe trip home, sir.

24 THE WITNESS: Thank you.

25 (Witness excused.)

1 MR. WARIN: Your Honor, may we approach for a moment?

2 THE COURT: Yes, sir.

3 (Sidebar on the record.)

4 MR. WARIN: Your Honor, the testimony that
5 Mr. Bridges raised with Mr. Cadenhead raised a problem of the
6 sword and shield with respect to the attorney/client privilege.
7 Given the way that there was a selective narrow waiver of the
8 privilege, it was repeatedly asserted with respect to matters
9 that were the subject of his testimony today. Let me give you
10 an example. There was testimony --

11 THE COURT: Tell me where you're going with this
12 before --

13 MR. WARIN: I would, I would like an instruction
14 telling the jury to disregard the testimony with respect to
15 Cox's dealings with other media companies and with respect to
16 his calculations. I have here a whole pile of e-mails that,
17 the first one of which starts with an e-mail from someone
18 representing other media companies, and it's followed by page
19 after page after page of redaction for privilege.

20 So by allowing him to elicit that testimony, he's
21 using that as a sword, that by asserting the privilege here,
22 he's using it as a shield. So that's the first topic.

23 Let me identify these for the record so it's clear.
24 These are Cox documents, BMG00208754. That's Issue No. 1.

25 Do you want me to let Mr. Bridges address that one

1 first?

2 THE COURT: No, go ahead. How many have you got?
3 Have you got three?

4 MR. WARIN: I've got two issues.

5 THE COURT: Two.

6 MR. WARIN: And here are additional documents. This
7 is a document again from the Record Industry Association to
8 Mr. Cadenhead talking about the number of notices that they had
9 sent in in the month of June, almost 6,000, and it's a
10 discussion about Cox's graduated response program, which he
11 talked about, and then assertion of a privilege with Mr. Beck.

12 Here's another notice with respect to a notice here
13 again from other industry groups, and again redacted, redacted,
14 redacted, and this one talks about the hard limit, and this one
15 is from Universal Studios, and they're talking about 3,700 in a
16 day from Universal Studios, and yet they redacted all
17 communications about that.

18 Here's another one in 2014 again from the Record
19 Industry Association, wanting to increase their limit.
20 Redacted, redacted.

21 So he's elicited testimony to try to create a
22 favorable impression that everything was hunky-dory with these
23 other claims and yet kept the documents from us. So that's
24 topic No. 1.

25 THE COURT: All right. Mr. Bridges?

1 MR. BRIDGES: Your Honor, I don't think that's -- I
2 don't quite understand what the concern is. He was
3 representing Cox externally --

4 THE COURT: Well, these are all -- have his name
5 embedded. These are all personal e-mails.

6 MR. BRIDGES: That's right, but the waiver was
7 regarding the types of notices --

8 THE COURT: Let's do this: Is this going to be the
9 subject of further testimony this afternoon?

10 MR. WARIN: I don't think so.

11 MR. BRIDGES: I don't think so, Your Honor.

12 THE COURT: All right, then let's do this: Let's
13 talk about this at 5:30, okay?

14 MR. WARIN: That would be fine, Your Honor.

15 MR. BRIDGES: Could we please have copies of that?

16 MR. WARIN: I'll be happy to give them the numbers.

17 MR. BRIDGES: Thank you.

18 THE COURT: Thank you.

19 MR. BRIDGES: I'm actually going to go back to the
20 home base, but I can try to arrange to be back here later today
21 at whatever time the Court wants.

22 THE COURT: I don't want to interrupt the jury any
23 further, so it would be at the end of the trial day.

24 MR. BRIDGES: I'll come back.

25 MR. WARIN: Thank you, Your Honor.

M. Carothers - Direct

1505

1 THE COURT: All right, thank you.

2 (End of sidebar.)

3 THE COURT: All right, next witness?

4 MS. JOBSON: Cox calls Mr. Matt Carothers.

5 THE COURT: All right.

6 MATTHEW EDWIN CAROTHERS, DEFENDANTS' WITNESS, SWORN

7 THE COURT: Greg, if you could grab those binders?

8 I'm sorry, I didn't see you giving, giving out the water there.

9 MS. JOBSON: I think we've got one more binder for
10 the clerk.

11 THE COURT: Yeah.

12 THE WITNESS: Thank you.

13 MS. JOBSON: Thank you.

14 THE COURT: Thank.

15 DIRECT EXAMINATION

16 BY MS. JOBSON:

17 Q. Mr. Carothers, can you please state your name for the
18 record.

19 A. Matthew Edwin Carothers.

20 Q. What is your educational background?

21 A. I studied computer science at the University of Oklahoma.

22 Q. Do you have a graduate degree?

23 A. I do not.

24 Q. What is your current job title?

25 A. I am Cox's principal security architect.

M. Carothers - Direct

1506

1 Q. How long have you worked at Cox?

2 A. About 14-1/2 years.

3 Q. When did you start at Cox?

4 A. April of 2001.

5 Q. What was your job when you first started at Cox in 2001?

6 A. I started out as a network engineer.

7 Q. What did you do as a network engineer?

8 A. Primarily I built systems related to provisioning of our
9 business services.

10 Q. Anything else?

11 A. I did a little bit of security work. At the time, we had
12 outsourced our ISP services to a third party called At Home,
13 and they handled most of our abuse desk work, but we did have
14 some areas where we had our own ISP service.

15 Q. And did you do any abuse work at that time?

16 A. At that time, it consisted of taking in complaint e-mails
17 and forwarding them off to our local markets for handling.

18 Q. What do you mean by local markets?

19 A. The company was much more decentralized at the time, and
20 so our local areas where we have service, each different city
21 where we had service had a lot of autonomy.

22 Q. And this was back in the 2001 time frame?

23 A. Yes.

24 Q. Did you ever begin to have a bigger role in dealing with
25 abuse issues at Cox?

M. Carothers - Direct

1507

1 A. Yes. In late 2001, the company At Home that had
2 outsourced our ISP services went bankrupt, and so we had about
3 six months to build an entire ISP.

4 Q. And at that point, did you become more involved in dealing
5 with abuse issues?

6 A. Yes. At that point, I was the Abuse Department.

7 Q. At any point, did you leave the Abuse Department?

8 A. I left the Abuse Department in March of 2007.

9 Q. And why is that?

10 A. We had a reorganization, and the team was split off
11 between operational roles and engineering roles, and I went
12 over to the engineering side.

13 Q. And is that where you currently are at Cox?

14 A. No. We've had a few more reorgs since then, and we have a
15 dedicated Security Team.

16 Q. And you said that you are the principal security
17 architect; is that right?

18 A. Yes. I am Cox's principal security architect.

19 Q. And in your role as principal security architect, do you
20 have any interaction with the Abuse Department?

21 A. Yes. I serve as an advisory role for the Abuse
22 Department. I research new threats, and I build new tools for
23 them to help them address issues.

24 Q. About how often do you communicate with people in the
25 Abuse Department in your role today as principal security

M. Carothers - Direct

1508

1 architect?

2 A. I see them daily because they're in offices next to mine,
3 but business dealings probably once a week.

4 Q. I think you mentioned before you might research new
5 security issues to help out the Abuse Department. Can you tell
6 us what you mean by that?

7 A. Yes. A big part of the Customer Safety Department's
8 mission is protecting customers from malware, which is
9 malicious software that criminals get and infect customer PCs
10 with, so I do a lot of research in terms of detecting new
11 threats and figuring out how to fix those.

12 Q. More broadly speaking, in your current role as principal
13 security architect, what are your job duties?

14 A. In addition to researching new threats and building new
15 tools, I am also Cox's liaison to a number of industry groups
16 and government groups such as the Department of Homeland
17 Security and the Federal Communications Commission, and I am
18 also Cox's liaison to our Legal Department, the Regulatory
19 Affairs Department.

20 Q. You mentioned you are involved in security industry
21 groups. What kind of things do you do with these security
22 industry groups?

23 A. Well, there's a lot of collaborative research that goes on
24 between different companies around security. In particular,
25 we're part of an FBI working group that is focused on taking

M. Carothers - Direct

1509

1 down botnets. A botnet is a network of compromised computers
2 that have been gathered together under a hacker's control. So
3 we've participated in several of those FBI operations over the
4 years.

5 Q. And how long have you been involved in these security
6 industry groups?

7 A. Since I've started really.

8 Q. Are you familiar with what BitTorrent is?

9 A. I am.

10 Q. Have you ever personally used BitTorrent?

11 A. I have.

12 Q. What for?

13 A. I have downloaded Linux distributions with it. Linux is a
14 free open source operating system. I also use it in my job
15 function occasionally to download security-related tools.

16 Q. And do you have an understanding of how others might use
17 BitTorrent?

18 A. I do.

19 Q. What is that understanding?

20 A. It could be used for anything that involves transferring
21 data across the Internet. There are video services that use
22 BitTorrent as their distribution. There are video game
23 companies that use BitTorrent to distribute their products.

24 Q. You mentioned earlier that you started the Abuse
25 Department at Cox. Can you remind us when that was?

M. Carothers - Direct

1510

1 A. That was late 2001.

2 Q. What was the purpose of the Abuse Department at that time?

3 A. At the time, we were still focused on just forwarding the
4 complaints off to the local markets, where someone local to the
5 customer would handle the issue.

6 Q. And do you understand that the Abuse Department might at
7 some point become called something else?

8 A. Yes. We eventually called it the Customer Safety
9 Department. In the -- in the beginning when the department was
10 founded, it was more focused on enforcing the Acceptable Use
11 Policy. As threats have evolved, though, we've reached a point
12 where a lot of the offenders are actually victims. Their PCs
13 have been infected with malware, and it's a criminal
14 controlling the customer's PC causing it to do bad things. So
15 in that spirit, we now call it the Customer Safety Department.

16 Q. And are they sometimes used interchangeably in documents
17 and conversation?

18 A. Yes. Abuse is still the industry standard term for it,
19 and abuse at whatever domainname.com is still the standard
20 mailbox that ISPs have for that.

21 Q. And going back to 2001, what kind of complaints did the
22 Abuse Department handle back then?

23 A. Back then, it was primarily spam. We had issues with
24 customers who would send out spam e-mails, and we had issues
25 with customers receiving spam in their own in boxes and

M. Carothers - Direct

1511

1 complaining to us about that.

2 Q. I think you mentioned back in 2001 that you were the Abuse
3 Department. Is that right?

4 A. That's correct.

5 Q. Did that change at some point?

6 A. It did. Fortunately, over the next few months as we built
7 our ISP, I was able to hire six people.

8 Q. And who did you hire?

9 A. Well, among others, I hired Jason Zabek and I hired
10 Joe Sikes.

11 Q. How did you otherwise build the department?

12 A. Yes. I also wrote a system called the Cox Abuse Tracking
13 System, or CATS.

14 Q. And what was the purpose of building CATS?

15 A. CATS allows us to automate the process of handling abuse
16 complaints.

17 Q. I'd like you to turn in your binder to DTX 1095. Are you
18 with me?

19 A. Yes.

20 Q. Does this look familiar to you?

21 A. It does.

22 Q. What is it?

23 A. It's a slideshow that I prepared many years ago explaining
24 exactly what CATS is.

25 MS. JOBSON: Your Honor, I'd like to move this into

M. Carothers - Direct

1512

evidence.

THE COURT: Any objection?

MR. ALLAN: No objection, Your Honor.

THE COURT: All right, it's received.

MS. JOBSON: Can we pull up DTX 1095? Fantastic.

Q. So could you walk us through a little bit about what CATS does?

A. Sure. CATS allows a small number of people to do a lot of work. It primarily does that by grouping together all of the complaints about a particular issue into something that we call a ticket. So, for example, if a customer sends out a million spam e-mails and a thousand people complain about that spam, we don't want to read all thousand of those e-mails, so CATS takes all thousand of them, figures out the customer in question, figures out that it is a spam complaint, and then puts it all together into one ticket.

Q. And who developed CATS?

A. I did.

Q. Did you write the code for the original CATS?

A. I did.

Q. Did CATS evolve over time?

A. It did. The original iteration of CATS was just an automated way to forward off complaints to our local markets, but it eventually evolved into a full-fledged ticketing system.

Q. What do you mean by a full-fledged ticketing system?

M. Carothers - Direct

1513

1 A. A ticketing system allows us to group related complaints
2 together. It allows us to keep a historical record of all the
3 incidents that a particular customer has had. It allows us to
4 store notes on what we've done in a particular case, and it
5 allows us to automate as much of our process as possible, for
6 instance, looking up who the customer is or figuring out what
7 type of complaint it is.

8 Q. Do you have an understanding of whether CATS functions
9 generally in that manner today?

10 A. Yes, it does.

11 Q. Is CATS separate from ICOMS?

12 A. Yes.

13 Q. Do you have an understanding of what ICOMS is?

14 A. Yes. ICOMS is our billing system.

15 Q. And those are separate systems?

16 A. They are.

17 Q. And once CATS creates a ticket in its system, does it ever
18 delete that ticket?

19 A. It does not.

20 Q. Once CATS creates a ticket, what happens?

21 A. Once the ticket is created, it performs as much of the
22 procedure as possible up to and including taking automated
23 action. It can send warning e-mails to customers. It can
24 actually even take them offline in an automated fashion.

25 Q. And is that included for complaints of copyright

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1 infringement?

2 A. It is.

3 Q. A moment ago, you mentioned customer-facing action. Are
4 you aware of any instances where CATS does not take a
5 customer-facing action on a given complaint?

6 A. Yes. There are two such cases. One is the daily rate
7 limits that we apply to senders, and the other is what we call
8 hold for more.

9 Q. Let's start with the hold for more. Can you explain what
10 that is, please?

11 A. Yes. For the specific case of a copyright infringement
12 complaint, we don't take a customer-facing action on the first
13 complaint. We create the ticket, and we store it, but we don't
14 send the customer a warning on the first complaint.

15 Q. Why is that?

16 A. There are two reasons for that. One, we had hundreds of
17 confirmed cases of false allegations, meaning that we got a
18 copyright complaint against a Cox IP address that never had a
19 customer on it and could not possibly have had a customer on
20 it.

21 The second is that we saw no statistical difference
22 between repeat complaint rates against customers who did
23 receive a warning versus those who didn't receive a warning.

24 Q. And you also mentioned, I think it was daily limit.
25 What's that?

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1 A. That's how we smooth out the spikes in our load. So, for
2 example, if we have a complainant who has 7,000 complaints to
3 send to us and we know that our call center can only handle
4 1,000, we want to receive 1,000 a day for seven days rather
5 than getting 7,000 on the first day and then none for the rest
6 of the week. This allows us to be fair to all of the
7 complainants, because it means that one complainant can't shove
8 the other out of the way, and it means that we can more
9 effectively handle all of the volume from any one particular
10 complainant because they're not overwhelming us on one day and
11 then leaving nothing to do for the rest of the days.

12 Q. At the time you developed CATS, did you have an
13 understanding of whether or how other ISPs were processing
14 abuse complaints, including complaints of copyright
15 infringement?

16 A. Yes.

17 Q. And how did you gain that understanding?

18 A. By speaking with other ISPs. ISP abuse departments are a
19 pretty tight-knit group.

20 MR. ALLAN: Your Honor, I think this might be
21 hearsay.

22 THE COURT: It sounds like it. You can't, you can't
23 testify about what other people told you. All right?

24 THE WITNESS: Okay.

25 THE COURT: Thank you.

M. Carothers - Direct

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1 MS. JOBSON: May he testify about his understanding
2 of other ISPs' activities?

3 No? Okay. I'll move on.

4 Q. In your current job as principal security architect, do
5 you use any tools to detect security threats on the Cox
6 network?

7 A. Yes, we use several of them. One is called Damballa,
8 which detects malware. Another is called Helios, which is
9 another malware detection tool, and another is called Procera.

10 Q. What's Procera?

11 A. Procera is what's called a deep-packet inspection tool.

12 Q. What is a deep-packet inspection tool?

13 A. It looks at network traffic going back and forth across
14 our network, identifies broadly what type of traffic it is, and
15 then stores statistics about what that traffic is.

16 Q. Are you aware of the types of information that Procera
17 DPI -- or can we call it DPI, short for deep-packet inspection?

18 A. Yes.

19 Q. Does that make sense?

20 Okay. Are you aware of the types of information that
21 the Procera DPI analyzes and records?

22 A. Yes.

23 Q. Are you aware of the types of searches that someone at Cox
24 could do using its DPI tool?

25 A. Yes.

M. Carothers - Direct

1517

1 Q. In your experience, how accurate are the statistics of the
2 Cox's Procera DPI tool?

3 A. It varies widely. So in some of our markets, particularly
4 our smaller ones, we have good coverage. In some of our larger
5 markets, the Procera platform has not kept up with growth, and
6 so it's overwhelmed, and in some areas, it's not able to fully
7 store all of the statistics just because there's too much data.
8 Another issue is that it can't always be 100 percent accurate
9 in identifying every protocol.

10 Q. What do you mean by full coverage?

11 A. So some areas of our network don't have Procera plumbed
12 into them.

13 Q. What does that mean?

14 A. The way it works is that copies of subscriber traffic are
15 sent to the Procera devices for analysis, but in some areas, we
16 don't have enough Procera devices to handle all of the traffic,
17 and so some of that subscriber traffic is never sent to Procera
18 for analysis.

19 Q. I think you also mentioned that, that Cox's DPI tool has
20 trouble identifying every protocol; is that right?

21 A. Yes, that's correct.

22 Q. What does that mean?

23 A. A lot of traffic is encrypted, especially these days after
24 the Snowden revelations and all the concern that people have
25 about the NSA. When traffic is encrypted, it's essentially

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1 password protected, so the intended recipient is the only
2 person who can see what's inside that packet.

3 Q. And in your experience, what types of traffic are
4 encrypted?

5 A. Many protocols are encrypted. Ones that stand out are
6 encrypted Web browsing and BitTorrent.

7 Q. Speaking broadly, what types of traffic can Cox's DPI tool
8 detect on the Cox network? I think you mentioned a bunch of
9 protocols. What are some other examples?

10 A. Streaming video is a big one. That's actually the top
11 driver on a network. That's things like Netflix, Hulu, and
12 YouTube. Of course, there's Web browsing, there's e-mail, all
13 kinds of stuff.

14 Q. And I think you mentioned this earlier but just to be
15 clear, is BitTorrent a type of traffic that Cox's DPI tool
16 could detect on its network?

17 A. Yes.

18 Q. Can Cox's DPI tool detect the contents of encrypted
19 BitTorrent traffic on Cox's network?

20 A. No, it cannot.

21 Q. What about unencrypted BitTorrent traffic?

22 A. No. Procera doesn't have that capability, and even if it
23 did, we wouldn't use it in that manner because that would be a
24 huge violation of our customers' privacy, and it's my
25 understanding that it's probably illegal as well.

M. Carothers - Direct

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1 Q. Could Cox use its DPI tool to determine the volume of
2 BitTorrent traffic on its network?

3 A. Yes.

4 Q. What about the content of BitTorrent traffic on its
5 network?

6 A. No.

7 Q. More specifically, could Cox use its DPI tool to detect
8 whether someone was using BitTorrent for sharing, for example,
9 music or movies?

10 A. No.

11 Q. Could Cox use its DPI tool to detect what files a person
12 uploads using BitTorrent?

13 A. No.

14 Q. What about what files a person downloads using BitTorrent?

15 A. No.

16 Q. Could Cox use its DPI tool to detect what Web sites a
17 person visits on its network?

18 MR. ALLAN: Objection, Your Honor. These are all
19 leading questions.

20 THE COURT: Yep, they are. Sustained. Let's not
21 lead now.

22 BY MS. JOBSON:

23 Q. In your current role, do you ever use Cox's DPI tool to
24 learn about traffic on its network?

25 A. I do not.

M. Carothers - Direct

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1 Q. Why not?

2 A. It's not relevant to my job function.

3 Q. Do you know what NetFlow is?

4 A. I do.

5 Q. What is it?

6 A. It is a traffic summary. It gives us a little bit of
7 information about network traffic, gives us the source IP and
8 the destination IP. It doesn't give us any of the contents of
9 the packets, and because of the volume of this NetFlow data, we
10 only look at one out of every thousand flows.

11 Q. What do you mean by one out of every thousand flows?

12 A. A flow is a connection across the Internet, and we only
13 export one out of every thousand of them from our routers for
14 analysis.

15 Q. What kind of analysis can you do with the NetFlow data
16 that you have?

17 A. We can get very broad statistics by simply taking the
18 number of bites sent and received and multiplying it by
19 thousands, multiplying it by a thousand. We can sort of guess
20 at how much traffic that we're seeing. It's particularly
21 useful for protecting customers against what's called a denial
22 of service attack, which is essentially just flooding the
23 customer with so many packets that it overwhelms their service.

24 Q. Does NetFlow distinguish between different types of
25 traffic?

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1 A. It does not.

2 Q. Could Cox use its DPI tool or NetFlow or any other tool to
3 stop subscribers from sharing files?

4 A. It is technically possible for us to shut down all of
5 BitTorrent. We can't detect an individual file, but it's
6 technically possible to shut down all of BitTorrent. However,
7 we would not do so because that would make the FCC very angry
8 at us. Comcast did this some years ago and got hugely fined.
9 It resulted in the FCC's ruling on something called net
10 neutrality, meaning that ISPs are not allowed to interfere in
11 traffic.

12 Q. Are there any tools that Cox could use to stop its
13 subscribers from sharing an individual file?

14 A. There are not. And if there were, frankly, we wouldn't
15 use them because we're not the police. We're not a judge.
16 We're not a jury. It's not our place to determine whether a
17 subscriber is breaking the law.

18 THE COURT: Just answer the question, all right?

19 THE WITNESS: Yes, sir.

20 THE COURT: All right. Your opinion is your opinion,
21 and you answer the questions that are being asked of you. All
22 right, sir?

23 THE WITNESS: Yes, sir.

24 THE COURT: All right. Thank you.

25 Go ahead.

M. Carothers - Cross

1522

1 BY MS. JOBSON:

2 Q. I think the question was, are there any tools that Cox
3 could use to stop its subscribers from sharing an individual
4 file?

5 A. The answer is no.

6 MS. JOBSON: Pass the witness.

7 CROSS-EXAMINATION

8 BY MR. ALLAN:

9 Q. Good afternoon, Mr. Carothers.

10 A. Good afternoon, Mr. Allan.

11 Q. You mentioned BitTorrent in your direct examination.
12 Would you say that Jason Zabek has more involvement in the
13 day-to-day operations of the Abuse Department and the knowledge
14 of how BitTorrent is used by Cox subscribers than you?

15 A. No. He does have more involvement in the day-to-day
16 running of the Abuse Department, but he doesn't have the level
17 of knowledge that I have when it comes to Procera and DPI and
18 BitTorrent.

19 Q. But he does have more knowledge with respect to dealing
20 with complaints of copyright infringement than you do, correct?

21 A. Yes.

22 Q. Can we pull up PX 1373, Karl?

23 The bottom e-mail here is an e-mail from Jason
24 Zabek -- this is already admitted, Your Honor -- Jason Zabek to
25 Terran Williams, and at the bottom, he says, "99 percent of

M. Carothers - Cross

1523

1 DMCA violations is from people using P2P on purpose and not
2 trojan activity," correct?

3 A. I do see that. All right.

4 Q. I want to ask you couple questions about Procera.

5 You can take that down.

6 Cox uses Procera's deep-packet inspection tool to
7 monitor its Internet traffic, correct?

8 A. Correct.

9 Q. And Procera's deep-packet inspection tool permits Cox to
10 understand the volume of BitTorrent traffic on the network;
11 isn't that right?

12 A. That's true.

13 Q. And Cox can monitor the amount of BitTorrent traffic that
14 a specific subscriber uses on a particular day, right?

15 A. Yes.

16 Q. Can we pull up PX 1432, please, Karl?

17 Mr. Carothers, when CATS forwards a notice of
18 infringement or a warning to its subscribers, there's an e-mail
19 notice from the company that's attached at the outset, correct?

20 A. Yes.

21 Q. That's something you programmed into the system yourself?

22 A. Yes.

23 Q. Okay. And Mr. Vredenburg, who was here the other day,
24 testified that this is, in fact, a copy of the notice, the
25 e-mail that the company sends attaching the notice of

M. Carothers - Cross

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1 infringement to the back. Do you agree with that?

2 A. Yes, that looks correct.

3 Q. I want to direct your attention to the third paragraph,
4 where it says, "As an Internet service provider, Cox is
5 responsible, under the Digital Millennium Copyright Act, to
6 advise when we receive a notice asserting infringement by you."

7 Do you see that?

8 A. I see that.

9 Q. And this is conveyed to subscribers through CATS that
10 are -- that receive a DMCA notice that makes it through Cox's
11 system, correct?

12 A. Yes.

13 Q. And you agree with that. Cox is responsible to advise
14 when -- to advise its subscribers when it receives a notice
15 asserting infringement, right?

16 MS. JOBSON: Objection.

17 THE COURT: Overruled. I'll allow it. Go ahead,
18 answer the question.

19 THE WITNESS: I'm sorry, repeat the question?

20 BY MR. ALLAN:

21 Q. Sure. So you agree with this, do you not, this is what
22 you tell -- the company tells subscribers that it received DMCA
23 notices, that Cox is responsible to advise its subscribers when
24 it receives a notice asserting infringement, copyright
25 infringement?

M. Carothers - Cross

1525

1 A. I personally don't have an opinion on that. That was the
2 letter that was written by our legal counsel.

3 Q. Well, this is programmed into your system that you
4 programmed in to send out.

5 A. I don't control the content, and Jason Zabek doesn't
6 control the content of the form letters. The form letters have
7 to be approved by the Legal Department.

8 Q. Okay. Below it, it says, "We are also required to take
9 appropriate action if further claims are received that you do
10 not resolve," correct?

11 A. Yes, it says that.

12 Q. And it also says in the paragraph below that, "We have a
13 duty to take progressive steps when we receive complaints of
14 infringement," correct?

15 A. Yes, I see that.

16 MR. ALLAN: Do you have 1320?

17 I don't think this is admitted yet, so --

18 Q. Mr. Carothers, do you recognize this?

19 A. Yes. I saw this during my prep work for one of my
20 depositions.

21 Q. Okay. And what is it?

22 A. It is a Q&A for CSRs when speaking to a subscriber.

23 MR. ALLAN: Your Honor, I'd move this into evidence.

24 THE COURT: Any objection?

25 MS. JOBSON: No, Your Honor.

M. Carothers - Cross

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1 THE COURT: All right, it's received.

2 MR. ALLAN: Could we pull this up, Karl? 1320 PX.

3 Yes, sir.

4 Q. I'm going to direct your attention to -- well, before we
5 get to that, this is a Q&A for folks at Cox to respond to
6 telephone calls from people that have received DMCA complaints,
7 correct?

8 A. That's my understanding, yes.

9 Q. Okay. And there's a reference here if the customer calls
10 in that copyright infringement is a violation of our AUP and
11 federal law. Do you see that?

12 A. I see that.

13 Q. And it states that Cox did not generate the infringement
14 notice. We are simply following our responsibility of
15 forwarding it on to you. Correct?

16 A. Correct.

17 Q. That's what Cox believes and tells its subscribers, right?

18 A. That's what it says here, but again, that was the opinion
19 of our Legal Department, not mine personally.

20 Q. Well, that's what the company's position was, right?

21 A. Yes.

22 THE COURT: That's what's in the official Cox
23 document. He said he's not involved in the legal end of
24 things --

25 MR. ALLAN: Right.

M. Carothers - Cross

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1 THE COURT: -- and is just reading what you're
2 showing him.

3 MR. ALLAN: Very good, Your Honor.

4 Q. One more direction on this document, Mr. Carothers. On
5 the next page, do you see the section that begins, "What this
6 means"?

7 A. Yes.

8 Q. Could you read that for the jury, please?

9 A. "What this means (in basic English) is that for Cox to not
10 be held liable for subscribers who infringe a copyright while
11 the material is transported through Cox's system, we must have
12 a policy that provides for termination of service in
13 appropriate circumstances for repeat infringers."

14 Q. Thank you.

15 Mr. Carothers, do you remember having a -- arranging
16 an Abuse Team meeting a few years ago with Mr. Sikes and
17 Mr. Zabek and some other folks to discuss issues with
18 addressing DMCA complaints?

19 A. I've had many such meetings.

20 Q. Okay. Could we pull up -- actually, I want to make sure
21 that this is admitted. Bear with me one moment, Mr. Carothers.

22 I actually don't believe this is admitted yet.

23 Do you see this, Mr. Carothers?

24 A. I do.

25 Q. This is an e-mail chain between you and Mr. Sikes at the

M. Carothers - Cross

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1 top and then you and the Abuse Team at the bottom?

2 A. Yes.

3 MR. ALLAN: I move this into evidence, Your Honor.

4 THE COURT: Any objection?

5 MS. JOBSON: No, Your Honor.

6 THE COURT: All right, it's received.

7 MR. ALLAN: Thank you, Your Honor.

8 So could we pull up PX 2022, please? Thank you.

9 Q. So starting at the bottom, Mr. Carothers, this is an
10 e-mail from you to the Abuse Team asking that any topics be
11 sent to discuss on today's DAB abuse call. Do you see that?

12 A. I do.

13 Q. And then the top e-mail, Mr. Sikes responds and he
14 says, "Hey, Matt! Here are some topics I am interested in."
15 He says, "Abuse life after DMCA. Could we really ignore the
16 bulk of DMCA notices?" Do you see that?

17 A. I see that.

18 Q. What's the date and time of this e-mail?

19 A. It is January 12, 2010.

20 MR. ALLAN: Could we go to PX 1332?

21 MS. JOBSON: I have no objection.

22 MR. ALLAN: Okay. Your Honor, we believe this is
23 admitted, and Ms. Jobson has no objection, but I just want to
24 make sure.

25 MS. JOBSON: No objection.

M. Carothers - Cross

1529

1 THE COURT: All right, it's received.

2 MR. ALLAN: Thank you.

3 Q. Mr. Carothers, you've -- this is an e-mail from you to, to
4 your Abuse Team. Do you see that?

5 A. Yes.

6 Q. And this is just a couple of hours after the e-mail we saw
7 from Mr. Sikes, when he asks you, "Could we really ignore the
8 bulk of DMCA notices," right?

9 A. Several hours, yes, but it's the same day.

10 Q. Very good. And you indicate these are Abuse Team meeting
11 minutes in the subject line of this e-mail, right?

12 A. Yes.

13 Q. And the attendees are Mr. Sikes and Mr. Zabek and some
14 other folks as well?

15 A. Yes.

16 Q. And in the e-mail, you say, "DMCA -- we are getting
17 crushed. Suspension limits being hit early in the day."

18 Do you see that?

19 A. Yes.

20 Q. And there's a reference here to a chart with a number of
21 increased complaint counts, showing a steady increase year over
22 year of DMCA complaints.

23 A. That's correct.

24 Q. And then toward the middle of the e-mail, you
25 indicate, "We are taking some steps to try and stem the flow."

M. Carothers - Cross

1530

1 Do you see that?

2 A. Yes.

3 Q. And then it looks like you list some of those steps that
4 you're taking to try to stem the flow of DMCA complaints below
5 that. Is that right?

6 A. No. It's not to stem the flow of complaints. It's to
7 smooth out the spikes in the volume. We still want to receive
8 the same number of complaints, but we want to get them day over
9 day with the daily suspension limit that's mentioned in here,
10 and also adding extra steps to the self-reactivation feature
11 allows us to deflect some of the calls.

12 Q. Mr. Carothers, smoothing out the spikes isn't written here
13 anywhere, is it?

14 A. No, but I'm the one that wrote the e-mail, and I
15 understand what I was talking about.

16 Q. I understand. But you don't -- the words "smoothing out
17 the spikes" aren't in this e-mail. In fact, what it says is
18 you're taking steps to try to stem the flow, and the first step
19 you take is to allow two self-reactivations in the walled
20 garden before requiring a call-in.

21 A. Yes.

22 Q. And the second step you take is to ignore auto close, the
23 first complaint against each customer, right?

24 A. Yes.

25 Q. And then the third step you take to stem the flow of DMCA

M. Carothers - Cross

1531

1 complaints is implementing a hard limit for all senders, and
2 you indicate that we only have hard limits on specific
3 high-volume senders. Moving forward, all senders will be
4 subjected to a daily volume limit. Any notices over that limit
5 will be automatically closed with a response back to the
6 sender.

7 Correct?

8 A. Yes. You'll notice that in the --

9 THE COURT: I'm sorry --

10 THE WITNESS: Oh, sorry.

11 THE COURT: You answer the questions yes or no if you
12 can. If you can't answer it, just say, I can't answer the
13 question that you've asked me, and if your counsel wants you to
14 discuss it further, then you'll have that opportunity on
15 redirect, but just --

16 THE WITNESS: Okay.

17 THE COURT: -- listen to the question and just answer
18 the question, please, sir.

19 MR. ALLAN: Thank you, Your Honor.

20 Q. Once the daily limit is reached, Mr. Carothers, does Cox
21 still process the notices?

22 A. Yes.

23 Q. And, but process really has nothing to do with informing a
24 subscriber that they're the subject of an infringement notice,
25 does it?

M. Carothers - Cross

1532

1 A. No, but it does inform the complainant of the limit so
2 that they can resend it the next day.

3 Q. Well, do you remember the definition of "process" that you
4 gave me at your deposition?

5 A. I don't.

6 Q. I asked you, "Then what do you mean when you say process
7 them? What does the company do?"

8 You gave the following answer: "The abuse tracking
9 system takes the notice in and handles it, but the automated
10 action that it takes is not to send the notice to the customer.
11 It's to close the ticket and respond back to the complainant,
12 letting them know that the complaint was not processed."

13 A. Yes.

14 Q. Now, CATS, the way you designed CATS, Mr. Carothers, was
15 to automate suspensions, right?

16 A. To automate all abuse actions, not just suspensions.

17 Q. Okay. But it certainly does automate suspensions?

18 A. It does.

19 Q. And there are two ways it does that, right? With the
20 soft-walled garden in which a subscriber can self-reactivate?

21 A. Yes.

22 Q. And a hard-walled garden in which a reactivation can be
23 done by someone in Atlanta, right?

24 A. Someone in customer care or someone in Atlanta, yes.

25 Q. Someone in -- okay. Very good.

M. Carothers - Cross

1533

1 But CATS doesn't automate the terminations, does it?

2 A. That's correct. It does not.

3 Q. That's done by the Technical Operations Center, the 2.5
4 folks?

5 A. Yes.

6 Q. With supervision from Mr. Zabek and Mr. Sikes; is that
7 right?

8 A. I'm not familiar enough with the day-to-day current
9 operations to say whether it's supervised by Mr. Zabek. I
10 would say that he's probably consulted.

11 Q. Okay. Termination is really just another suspension,
12 isn't it, Mr. Carothers?

13 A. No.

14 Q. Okay. Let me show you PX 1827. Yes, this is admitted.
15 Yes, thank you.

16 Mr. Carothers, I'm showing you what looks to be a
17 chat between Brent Beck and Harry Spriggs, and Mr. Beck asks --
18 he's got process questions at the top, "To help me understand
19 something. Termination. What happens to the actual service
20 and modem?"

21 Do you see that?

22 A. I see that.

23 Q. And Mr. Spriggs responds, "Same as what happens with a
24 regular suspension. It used to be that we completely removed
25 all HSI" -- which stands for high-speed Internet services --

M. Carothers - Cross

1534

1 "but since so many of them were just getting reactivated the
2 next day, and because it's such a huge pain to re-add services
3 once they've been removed, Jason gave us the go-ahead to just
4 use the AUP and call it a termination."

5 Correct?

6 A. Yes. That is what it says.

7 Q. Can we go to PX 2003?

8 Mr. Carothers, I've handed you PX 2003. Do you see
9 that?

10 A. I do.

11 Q. Okay. I want to direct your attention to the bottom of
12 the e-mail with Mr. Zabek, where he states, "Remember that we
13 must terminate to receive protection under the Safe Harbor
14 Amendment." Do you see that?

15 A. Yes.

16 Q. And then let's go up to the e-mail right above that from
17 Mr. Beck, and he responds, "So that leaves the customer's
18 service intact then."

19 And then Mr. Sikes responds -- oh, I'm sorry, I
20 skipped one. I apologize, Mr. Carothers.

21 So we started with the bottom one, "Remember that we
22 must terminate to receive protection."

23 And then Mr. Sikes responds, "Yep, right. We sure
24 do. But I don't believe that TOC is actually terminating the
25 service, completely removing it in ICOMS?"

M. Carothers - Cross

1535

1 And ICOMS, you just testified to, is the payment
2 database, correct?

3 A. Right.

4 Q. "They are just clicking terminate and update ticket, which
5 shows a termination in the customer's ticket history." Right?

6 A. Yes.

7 Q. So basically, it just creates a record of a terminated
8 customer, but the customer is not really being terminated,
9 right?

10 A. Not correct, no.

11 Q. Well, that's what this document says, doesn't it,
12 Mr. Carothers?

13 A. There's --

14 MS. JOBSON: Objection. Lacks foundation.

15 THE COURT: Well, I mean, he can read the document,
16 and if he agrees that those are the words in the document, then
17 he should say yes. If those aren't the words in the document,
18 then he can say no.

19 BY MR. ALLAN:

20 Q. Is that what the document says, Mr. Carothers?

21 A. That is what the document says.

22 Q. Thank you.

23 Now, Mr. Carothers, at your deposition, you were the
24 corporate witness for Cox on a number of different topics; is
25 that right?

M. Carothers - Cross

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1 A. Yes.

2 Q. And what that means was that the company put you up to
3 testify on a number of topics as though you were speaking on
4 behalf of the company itself?

5 A. Yes.

6 Q. And I asked you several questions about Rightscorp,
7 correct?

8 A. Yes.

9 Q. And it's true, isn't it, that Cox never, never even
10 considered forwarding Rightscorp's notices without the
11 settlement offer?

12 A. No, not to my knowledge.

13 Q. And Cox never considered extracting out the settlement
14 language from Rightscorp's notices?

15 A. No. We wouldn't have altered it before forwarding it.

16 Q. And Cox never considered forwarding the notice in an
17 amended way of some sort that didn't include the settlement
18 language?

19 A. No.

20 Q. And Cox never considered generating a separate notice to
21 inform subscribers consistent with Cox's responsibilities and
22 duties that they had been notifying subscribers that they'd
23 been the subject of an infringement notice?

24 A. No. We did not consider creating a separate process.

25 Q. I'm going to hand you PX 1340, Mr. Carothers. I believe

M. Carothers - Cross

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1 this is admitted into evidence.

2 You've seen this, Mr. Carothers?

3 A. Yes.

4 Q. This is the e-mail where Mr. Zabek is saying F the DMCA,
5 and Mr. Sikes is saying F Rightscorp, right?

6 A. Yes.

7 Q. And at the very top here, you send an e-mail to those two
8 gentlemen, and you say, "Sorry to be Paranoid Panda here, but
9 please stop sending out e-mails saying F the law or F some
10 company. If we get sued, those e-mails are discoverable and
11 would not look good in court."

12 A. Yes.

13 Q. You didn't tell them to knock it off because Cox is more
14 respectful as a company, did you?

15 A. No. Those are not my words.

16 Q. And you didn't say, stop saying these words because, you
17 know, we, Cox, have an obligation to treat and respect
18 copyright infringement notices?

19 A. That's correct.

20 MS. JOBSON: Objection. Argumentative.

21 THE COURT: Overruled.

22 BY MR. ALLAN:

23 Q. And you didn't say, stop saying e-mails like this because
24 we, Cox, respect the DMCA?

25 A. Nope, I did not say that.

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1 Q. And what you did was you told them to stop simply because
2 it might be discoverable and you might look bad in court,
3 right?

4 A. Those are my words, yes.

5 Q. A couple other things I wanted to go through from your
6 deposition. Again, you were the corporate witness on a number
7 of topics. We've talked a lot about the current iteration of
8 the residential abuse ticket handling procedures in this case,
9 and I asked you if you knew who is responsible for developing
10 and preparing that current iteration. You didn't know, did
11 you?

12 A. I don't recall exactly what my answer was, but if that's
13 what I said in my deposition, then I won't argue with you.

14 Q. And I also asked you if you knew why the TOC work force
15 was reduced to four people in 2011, and you didn't know the
16 answer to that, either, did you?

17 A. Actually, I did know the answer to that when it was
18 reasked in my second deposition.

19 Q. Well, I have a question and answer here: "Why did the
20 company reduce the staffing in terms of the number of employees
21 that the TOC had in 2011?"

22 You gave an answer, "I don't know"?

23 THE COURT: Well, if he answered it in a subsequent
24 deposition, as he appears to have said, then that has been
25 supplemented, hasn't it, Mr. Allen?

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1 MR. ALLAN: It has, Your Honor. I'm just not aware
2 of that answer.

3 THE COURT: All right. Well, you have a copy of the
4 second deposition.

5 MR. ALLAN: I do.

6 THE COURT: If you're not going to use it, then we'll
7 take him at his word that it was supplemented.

8 MR. ALLAN: Fair enough. Fair enough, Your Honor.

9 Q. I asked you, "So as the corporate witness, you don't know
10 when the soft termination protocol was put in place?"

11 And you answered, "That is correct"; is that right?

12 A. That's correct.

13 Q. And I asked you -- I said, "You, as the corporate designee
14 don't know why the soft termination was put in place?"

15 Do you remember what your answer was?

16 A. I had never seen the phrase "soft termination."

17 Q. You on behalf of the company had never seen the phrase
18 "soft termination"?

19 A. I had not.

20 Q. All right. "And you as the corporate designee didn't know
21 who was involved in the decision to implement a soft
22 termination?"

23 You said, "That is correct"?

24 A. Correct.

25 Q. And I asked you -- I said, "You as the corporate designee

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1 don't know whether the soft termination protocol is still in
2 place?"

3 You said, "No, I don't," right?

4 And I also asked you, "Since you've been out of the
5 Abuse Department since 2007, only serving in an advisory role,"
6 which you testified to today, I asked you if Mr. Zabek and
7 Mr. Sikes would have more understanding of the day-to-day
8 operations at that department than you.

9 Do you remember what your answer was?

10 A. Yes, they would.

11 MR. ALLAN: Thank you. Nothing further.

12 THE COURT: All righty. Redirect?

13 MS. JOBSON: No, Your Honor.

14 THE COURT: All right. May Mr. Carothers be excused?

15 (No response.)

16 THE COURT: All right. You're excused with our
17 thanks, sir. Please don't discuss the testimony you've given
18 today until our trial is over, all right?

19 THE WITNESS: Thank you, sir.

20 THE COURT: All right. Have a good day.

21 (Witness excused.)

22 THE COURT: Next witness?

23 MR. WAKEFIELD: Your Honor, the defense is going to
24 be calling Mr. Christopher Rucinski. We've got some disputes
25 about his slides.

1 Is this still something you want to discuss?

2 MR. CARACAPPA: I think so, yes.

3 THE COURT: All right. Then why don't we take our
4 mid-afternoon break a little early so that you don't have to
5 listen to that noise. We'll hopefully come back around,
6 probably around 25 after, all right? Thank you.

7 (Jury out.)

8 THE COURT: All right, what's our dispute?

9 MR. BUCKLEY: Your Honor, if I can, would you like to
10 see a copy of the slides?

11 THE COURT: I would, yeah.

12 MR. BUCKLEY: And then I also, I sent this to counsel
13 earlier. I prepared just a short table that has the slide and
14 then the support for the slide, so that as we go one by one.
15 There are only four, I think.

16 THE COURT: Okay. Great. Thank you.

17 MR. BUCKLEY: And, Your Honor, I did provide this to
18 counsel earlier today, but it also memorializes two different
19 phone calls we had last night.

20 THE COURT: All right.

21 MR. BUCKLEY: It's just the substance of what we
22 talked about last night.

23 THE COURT: And the slides themselves, when were they
24 produced?

25 MR. BUCKLEY: Last night by the 7:00 deadline.

1 THE COURT: All right. All right. So which ones are
2 objected to?

3 MR. CARACAPPA: Yes, Your Honor. So --

4 THE COURT: Slide 1.

5 MR. CARACAPPA: Well, slide 1 says how BitTorrent
6 works, and Mr. Rucinski was not and did not talk about how
7 BitTorrent worked in his report. That was Mr. Rosenblatt. I
8 understand that counsel said that Mr. Rucinski is going to talk
9 about this with respect to the 10 percent, which he did talk
10 about in his report. So if that's the purpose of the slide,
11 we're fine with it as long as it's limited to what's in his
12 report.

13 MR. BUCKLEY: Your Honor, Mr. Rucinski's entire
14 report is about how BitTorrent works. It's about how their
15 system works with BitTorrent. I could read every heading and
16 it relates to BitTorrent. That's how the Rightscorp system
17 works. It monitors BitTorrent's swarms, and the whole reason
18 we retained Mr. Rucinski was to talk about that.

19 THE COURT: Mr. Caracappa?

20 MR. CARACAPPA: He does talk about how the Rightscorp
21 system works, but I'll note paragraph 8 of Mr. Rucinski's
22 opening report, he says, "Rather than reintroduce the
23 BitTorrent policy necessary for this section, I incorporate by
24 reference the section entitled, "Salient Aspects of BitTorrent
25 from William Rosenblatt's Report."

1 THE COURT: Well, did you depose him on the issue on
2 his -- on testimony about BitTorrent and how -- well, how
3 Rightscorp used -- identified the BitTorrent infringing works
4 or, yeah, how the system worked to identify the infringing
5 works in the BitTorrent cloud, or whatever it's called?

6 MR. CARACAPPA: We did, Your Honor, and again, we
7 don't have an objection to Mr. Rucinski talking about the
8 Rightscorp system, but when we asked him to talk about
9 BitTorrent in general, he said, well, I'm going to rely on
10 Mr. Rosenblatt.

11 And we said, "Well, we've never seen you -- we've
12 never seen anyone incorporate someone else's report in his own
13 report."

14 He said, "Well, I saw it the night before, and I
15 could talk about that stuff, too, but it is in his report."

16 So it's the bait and switch. We have two experts to
17 talk about this, and we can decide which one at trial we're
18 going to call, and we think that's what they're doing here.
19 Again, we don't have a problem if he talks about the Rightscorp
20 system.

21 THE COURT: Isn't that the relevance --

22 MR. BUCKLEY: I'm sorry, Your Honor.

23 THE COURT: Mr. Buckley, is there any problem with
24 that, limiting his testimony to how the Rightscorp system
25 identifies infringing activity on BitTorrent?

1 MR. BUCKLEY: Probably not. I think maybe we're all
2 saying the same thing. So this slide is actually
3 Ms. Frederiksen-Cross's slide, and what he was going to do was
4 when he starts to talk about some of the details of BitTorrent
5 and he's using termination like peers and other things, he was
6 going to put her slide back up and spend a minute, two minutes
7 just giving the jury a refresher on how BitTorrent works.

8 And to be fair, what he said was, I'm not going to
9 repeat how BitTorrent works. We have another expert who's
10 already talked about it, so I'm not going to spend ten pages
11 doing the same thing.

12 THE COURT: Is that controversial?

13 MR. CARACAPPA: No, Your Honor. Again, if that's all
14 he's going to do, we don't have a problem.

15 THE COURT: I think we're all --

16 MR. BUCKLEY: We're all saying the same thing.

17 THE COURT: We're okay there.

18 How about slide 2?

19 MR. CARACAPPA: Slide 2 wasn't in his expert report,
20 Your Honor, and I don't think those are -- these are not
21 artists in the case.

22 THE COURT: They're not what?

23 MR. CARACAPPA: They're not artists in the case, so
24 they're not on the list of asserted copyrights.

25 MR. BUCKLEY: Your Honor, this was discussed by

1 Mr. Rucinski in his MSJ declaration, but more to the point,
2 this is just a blow-up from the infractions table that they put
3 in, and this is just to illustrate what the jury has already
4 heard a little bit about, that there are days when there are
5 multiple notices sent for the same file. And again, this is a
6 minute of his testimony.

7 THE COURT: Well, and it's already been testified to.
8 I can't remember who said it, but I know it's been the subject
9 of testimony.

10 All right, that will be allowed.

11 MR. CARACAPPA: I don't think there's an issue with
12 respect to 2 and 3.

13 MR. BUCKLEY: That was 2 we just talked about.

14 THE COURT: That was 2.

15 MR. CARACAPPA: I'm sorry, 3 and 4. I don't think
16 there's an issue.

17 THE COURT: Okay.

18 MR. CARACAPPA: 3 and 4 are slightly different than
19 what's in his expert report, but we understand that the case
20 has been changing, so these are just updated numbers.

21 THE COURT: Okay.

22 MR. CARACAPPA: And same thing with respect to -- you
23 don't have numbers on the slide -- and then we're fine with 5,
24 too.

25 6 and 7 we just feel are more detailed than anything

1 in Mr. Rucinski's expert report, and he didn't talk about a
2 day-by-day analysis. He has a chart that talks about the
3 overall numbers but nothing at this level of detail.

4 THE COURT: This is the -- entitled, "The Number of
5 Notices Sent to Cox Per Day"?

6 MR. BUCKLEY: Right.

7 MR. CARACAPPA: Yes.

8 MR. BUCKLEY: And there are two that are titled that
9 way, and, Your Honor, it's literally the same data from the
10 three slides before, just blown up to show two time periods,
11 and again, we will be through these slides in two minutes.

12 THE COURT: Well, I mean --

13 MR. BUCKLEY: It's to illustrate that there were time
14 periods when there were significant -- relevant time periods
15 when there were significant spikes in the amount of notices
16 being sent on a daily basis.

17 THE COURT: All right. There's been a lot of
18 testimony about that as well, so we'll allow them.

19 MR. CARACAPPA: Okay. Thank you, Your Honor.

20 THE COURT: Anything else?

21 MR. BUCKLEY: I think you had objections to a couple
22 of the exhibits, too.

23 MR. CARACAPPA: Right.

24 Yes, Your Honor. Again, these were BitTorrent
25 exhibits that were not cited in Mr. Rucinski's report.

1 MR. BUCKLEY: So these are -- there are two
2 documents, and I can show them to you if you want to see them,
3 but they just talk about the BitTorrent protocol and the
4 specifications. He did reference them again via Mr. Rosenblatt
5 because we were going to have Mr. Rosenblatt talk about
6 BitTorrent. The reason that we -- we don't have to offer these
7 if you don't think it's worth it.

8 The reason we were going to is that there's a lot of
9 technical terminology, and when the jury goes back, they may
10 want to have something to look at, and one of these things is a
11 wiki that says, here is what a peer is, here is what a leecher
12 is. So I actually thought it might be useful.

13 THE COURT: All right. They won't come in unless
14 you-all agree that you want the jury to have them at some
15 stage, but if they're not part of the report, and, you know,
16 that -- allowing Mr. Rucinski to testify generally about
17 BitTorrent is one thing, but having him testify about the
18 technical aspects of it without having given notice that he was
19 going to do that is beyond the scope of the Rule 26 disclosure
20 requirements.

21 What else?

22 MR. BUCKLEY: Then I think the last one is we had
23 identified the amended complaint as an exhibit because he
24 relied on it in his report and referenced some data that was in
25 it. I don't know exactly what the objection is to that other

1 than it references Round Hill that's no longer part of the
2 case.

3 MR. CARACAPPA: He didn't rely on it in his report at
4 all, Your Honor. That was the objection. It was in the -- he
5 addressed it in his declaration to the summary judgment motion,
6 but it was not in his report.

7 MR. BUCKLEY: You're absolutely right. I stand
8 corrected. He referenced it in his summary judgment
9 declaration. He's absolutely right.

10 THE COURT: Well, how does that get him --

11 MR. BUCKLEY: The data that he's going to -- it
12 underlines one of the slides. He can talk about that
13 generally. It doesn't have to come in as an exhibit if that's
14 the issue.

15 THE COURT: Okay. Then I won't permit that exhibit,
16 either.

17 MR. CARACAPPA: Thank you, Your Honor.

18 MR. BUCKLEY: Thank you, Your Honor.

19 THE COURT: All right. All right. Then let's take
20 our recess. We'll probably come back at 3:30. All right?

21 MR. CARACAPPA: Yes, Your Honor.

22 THE COURT: All right. We're in recess.

23 (Recess from 3:17 p.m., until 3:34 p.m.)

24 (Jury out.)

25 THE COURT: All right. Are we ready for our jury?

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1 MR. BUCKLEY: Yes.

2 THE COURT: All right, Greg, would you get our jury,
3 please, sir?

4 (Jury present.)

5 THE COURT: All right, please be seated.

6 Mr. Buckley, next witness?

7 MR. BUCKLEY: Your Honor, the defense calls
8 Christopher Rucinski.

9 THE COURT: All right.

10 CHRISTOPHER THOMAS RUCINSKI, DEFENDANTS' WITNESS, SWORN
11 DIRECT EXAMINATION

12 BY MR. BUCKLEY:

13 Q. Good afternoon, Mr. Rucinski. Are you situated there?

14 A. I am.

15 Q. Can you please state your full name for the record?

16 A. My full name is Christopher Thomas Rucinski.

17 Q. And can you tell the jury what you were asked to do in
18 this case?

19 A. What I was asked to do in this case was evaluate the
20 reliability of both the Rightscorp system and the notices that
21 that system generated.

22 Q. And you performed that work?

23 A. I did.

24 Q. And you reached opinions about the reliability of the
25 Rightscorp system of notices?

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1 A. Yes, I did.

2 Q. Let's start talking a little bit about your background.
3 Could you tell the jury your education, please?

4 A. Sure. So for my undergraduate degree, I got a computer
5 science bachelor's from Princeton University, and then in 2015,
6 I was certified as a forensic examiner through the GIAC, which
7 is the, I think, Global something Assurance. There's an
8 acronym to look up for that.

9 Q. And be sure to keep your voice up so the jury can hear
10 you.

11 A. Sure. Thank you.

12 Q. And, I'm sorry, you said your degree was in?

13 A. It is in computer science.

14 Q. Are you a coder yourself? Do you do any software coding?

15 A. Yeah, a lot.

16 Q. Can you tell the jury about that?

17 A. Sure. Most of the software development that I've done has
18 been in the Java programming language. In fact, the earliest I
19 was programming in Java was in high school, where I took a few
20 computer science classes there, and then a lot of casework that
21 I've done in my employment has also been in Java, and I've had
22 some other employment related to Java programming as well.

23 Q. Okay. And since you mentioned your employment, could you
24 give us a brief overview of your job history?

25 A. Sure. So one company I worked at where I programmed in

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1 Java was a startup called Scvngr, and their whole game was that
2 they wanted to make a scavenger hunt so you could play on your
3 smartphone, so there I was developing an Android app. Android
4 apps are programmed to Java.

5 Immediately after graduating from college, I started
6 working at Elysium Digital, which is a litigation consulting
7 firm, so we support all sorts of litigation and pre-litigation
8 matters where there's some aspect of technology involved.

9 Elysium Digital was then acquired by a company --
10 this year by a company called Stroz Friedberg, and they do a
11 similar sort of thing. They're more on the side of sort of
12 collecting artifacts from computers, where a sample case that
13 they might do is where an employer thinks an employee has
14 stolen information from them upon their departure, and they
15 will analyze the artifacts that were on that employee's laptop
16 to demonstrate what actually occurred on that laptop.

17 Stroz Freidberg acquired Elysium mostly for their
18 patent practice, which is something that they didn't really do.

19 Q. So let me take you back for a minute. So you said you
20 joined Elysium in what year?

21 A. That was in 2010, after I graduated from college.

22 Q. Okay. And when you were at Elysium, what were your
23 general responsibilities? What did you do in your job?

24 A. Well, generally, it was all sorts of casework. For the
25 most part, it was reviewing source code that was at issue in

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1 some sort of litigation. So a lot of that was patent
2 litigation, so if one company sued another over potential
3 patent infringement, we would get source code for whichever
4 side we were working for and evaluate or help the attorneys to
5 come to an understanding about how the source code related to
6 the patents in that case.

7 Q. Okay. And then you said Elysium was acquired by Stroz
8 Friedberg when?

9 A. That was in, that was August 1 of 2015.

10 Q. And did your responsibilities or job duties change after
11 the acquisition?

12 A. For the most part, they stayed the same. I did receive a
13 promotion to director at that point in Stroz Friedberg, and I
14 acquired two more direct reports after that.

15 Q. How many direct reports do you have today?

16 A. Currently, I have eight.

17 Q. And can you describe generally what does your team do?
18 What do the members of your team do?

19 A. Sure. So two of them, their background is more related to
20 artifact collection. That's sort of the general line of work
21 that Stroz Friedberg was in before they acquired Elysium. So
22 most of their work is related to imaging laptops, like,
23 acquiring information from laptops and figuring out what
24 happens over some period of time.

25 The other six of my direct reports have a background

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1 more similar to mine, which is strictly computer science, and
2 their work is mostly geared towards source code analysis.

3 Q. Mr. Rucinski, what do you consider your expertise?

4 A. I consider my expertise to be in computer software code
5 and data analysis as well as forensic evidence collection.

6 Q. And do you have experience in other cases that are similar
7 to this one?

8 A. Sure. There's a number of cases I've worked on where Java
9 source code has been the primary issue in the case or the
10 primary analysis that I have performed. A lot of those cases
11 have related to source code for Android applications in the
12 Android system, which itself has a lot of Java components in
13 it. Some of those cases have also involved JSP, which is sort
14 of Java code that runs on a server, and there were probably
15 between 10 and 15 of those, such cases that I worked on.

16 Q. Mr. Rucinski, you and I have the same problem, which is
17 our voices trail off, so can you keep your voice up so we can
18 make sure the jury is hearing you?

19 A. Sure. Can I adjust this?

20 Q. Thank you. You're also tall, which doesn't help. Thank
21 you.

22 If I could, I'd like to show the witness what we've
23 marked as DTX 3481.

24 Can you look at what we've marked at DTX 3481 and
25 tell me if you've seen that before?

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1 A. I have.

2 Q. What is it?

3 A. It appears to be my up-to-date CV.

4 Q. And I was just going to ask, it's up to date? It's
5 current?

6 A. Yes, I believe it is.

7 MR. BUCKLEY: We'd offer it into evidence, Your
8 Honor.

9 THE COURT: Any objection?

10 MR. CARACAPPA: No objection, Your Honor.

11 THE COURT: It's received.

12 BY MR. BUCKLEY:

13 Q. Can you describe generally the materials that you reviewed
14 as part of your work in this case?

15 A. Sure. So these materials include the Rightscorp source
16 code that was produced, the data that was produced from
17 Rightscorp. I also reviewed deposition transcripts and
18 transcripts from this trial. I also attended three depositions
19 for this case: the second deposition of Mr. Boswell, the
20 second deposition of Mr. Steele, and the deposition of
21 Ms. Frederiksen-Cross. I believe I also saw briefs that were
22 exchanged between the parties over the course of this
23 litigation and other documents related to the case.

24 Q. Do you know how, approximately how many hours you have
25 personally spent analyzing the Rightscorp code and data?

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1 A. Personally? I think that would be around 300 hours.

2 Q. And how about other members of your team?

3 A. So there were two other people that assisted me in my work
4 on this case. One was named Scott; one was Rafiq. They both
5 spent probably 200 hours. That's 200 hours each.

6 Q. In addition to the work that you did?

7 A. That's correct.

8 MR. BUCKLEY: Your Honor, at this time, we'd offer
9 Mr. Rucinski as an expert in computer source code and data
10 analysis and digital evidence collection.

11 THE COURT: Any objection?

12 MR. CARACAPPA: Computer source code we don't have a
13 problem with, Your Honor. Data analysis and digital evidence
14 collection, I'm not sure I heard enough.

15 THE COURT: All right, why don't you ask him about
16 that, data collection.

17 MR. BUCKLEY: Certainly.

18 Q. So, Mr. Rucinski, can you talk a little more about your
19 experience with data analysis specifically?

20 A. Data analysis specifically. So one of the program
21 languages I'm familiar with is SQL, which is also a program
22 language that is at issue in this case.

23 THE COURT: I'm sorry, what was the name of the
24 program?

25 THE WITNESS: It's a programming language called SQL.

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1 It's spelled S-Q-L.

2 THE COURT: Okay. I saw it in your resume. Okay.

3 THE WITNESS: So that's where most of my data
4 analysis experience comes from.

5 BY MR. BUCKLEY:

6 Q. Okay. And what does the term "data analysis" mean to you?

7 A. Sure. So I guess I would distinguish it from source code
8 analysis because source code analysis is really figuring out
9 how a software system operates, and data analysis is more
10 looking at data that already exists and figuring out, you know,
11 what sort of conclusions you can draw from that data and how
12 that data is related or intended to be used.

13 Q. And did the work that you did at Elysium for five years,
14 did it relate at least in part to data analysis?

15 A. Yeah. I've used SQL on other cases as well, for instance.

16 Q. And your current responsibilities, is data analysis a part
17 of those responsibilities?

18 A. Yeah. As it comes up on cases, that's something I would
19 do.

20 Q. And that's something you did in this case, right?

21 A. Absolutely.

22 Q. How about digital evidence collection? Can you speak to
23 that in your experience?

24 A. Sure. So the certification I received in 2015, that was
25 mostly related to artifacts on Windows computers, but a

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1 substantial part of that certification material related to how
2 to preserve evidence from computer systems and the appropriate
3 actions to take when dealing with that evidence and handing it
4 off to different parties.

5 Q. And I think you spoke to this, but can you give an example
6 of the type of engagement you might be retained for that would
7 involve digital evidence collection?

8 A. Sure. So the example I gave earlier was, say, an employee
9 leaves an employer on not the best terms and the employer
10 thinks that employee had stolen data. So one thing they might
11 do is hire the company that I work for to figure out based on
12 the artifacts, like the files and other information that are
13 still left on that employee's computer, what actually happened
14 over time, and just reconstruct sort of a timeline of what we
15 can gather from that information.

16 Q. And your current responsibilities in the engagements you
17 work on involve those sorts of issues, right?

18 A. Yeah. I'm managing at least one case, maybe two, I guess,
19 right now where two of my direct reports are doing different --
20 they're performing different sorts of work for cases just like
21 that where there's an issue where we're imaging employee
22 laptops, where we're collecting the data off those laptops and
23 figuring out what that data actually means.

24 MR. BUCKLEY: Your Honor, we re-offer Mr. Rucinski.

25 THE COURT: All right. Any objection now?

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1 MR. CARACAPPA: No objection, Your Honor.

2 THE COURT: All right. He'll be permitted.

3 MR. BUCKLEY: Thank you.

4 THE COURT: I was wrong about that term of that
5 software. I was looking at a different word in your resume,
6 which is S-c-v-n-g-r.

7 THE WITNESS: Oh, yeah. That's Scvngr. It didn't
8 have any vowels in its name.

9 THE COURT: Okay. All right.

10 BY MR. BUCKLEY:

11 Q. So just so the jury knows what we're talking about, this
12 is the app company that you worked for that you referenced?

13 A. Yeah, this is the startup I worked for. That was an
14 internship after junior year of college.

15 Q. And Scvngr is spelled without any vowels?

16 A. Yes.

17 THE COURT: I'm sorry for that aside there.

18 MR. BUCKLEY: Okay. It's interesting.

19 THE COURT: I had been mistaken. Go ahead.

20 MR. BUCKLEY: Thank you, Your Honor.

21 Q. So, Mr. Rucinski, let's talk about -- you said you
22 reviewed the Rightscorp code in this case, right?

23 A. I did.

24 Q. Okay. Let's talk about your receipt of the Rightscorp
25 code. So first of all, when were you first engaged in work in

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1 this case?

2 A. That would be April of 2015.

3 Q. And when did you first receive portions of the Rightscorp
4 code?

5 A. The first time we received source code from Rightscorp
6 would have been at the end, or towards the end of May 2015.

7 Q. 2015?

8 A. 2015.

9 Q. And when you received that first portion of the code, what
10 did you conclude from it?

11 A. So the first conclusion was after having looked at it, we
12 didn't have a complete system to analyze. There were
13 references to other files that I understood would be important
14 to the system, and so what I did was through counsel asked
15 Rightscorp to produce more source code so that I could conduct
16 a full analysis of their system.

17 Q. And did you receive additional source code?

18 A. Over the next about six or seven weeks after that, we
19 received different portions of the Rightscorp source code over
20 time, where it was sort of an iterative process where we would
21 receive some more and then notice that perhaps we needed some
22 more to do a complete analysis, and we'd receive another drop
23 of code after that.

24 So over the course of six or seven weeks, we received
25 about a half-dozen or so source code productions.

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1 Q. Did you say about a half-dozen?

2 A. About a half-dozen.

3 Q. Did you ever receive a full version of the Rightscorp
4 code?

5 A. I wouldn't say that I have.

6 Q. And can you explain that?

7 A. Sure. So I think -- like, when I think of a version of
8 source code, I'm thinking of something like Windows 7 or
9 Windows 10. It's a software product that has, has a number
10 associated with it where we know -- thank you -- where we know
11 that that software was operative for some period of time.

12 So for the Rightscorp system -- first of all, there's
13 no such notion as a Rightscorp 1.0 or Rightscorp with any
14 number after it. So the source code that I received in 2015
15 was over the course of six or seven weeks, and I will
16 acknowledge that it seems like for each source code production
17 I got, that seemed to be the source code that was operative at
18 that time, but all together over the course of six or seven
19 weeks, I don't have a snapshot of the Rightscorp system to
20 analyze.

21 Q. In your experience, is the way you received the Rightscorp
22 code, is that typical?

23 A. I wouldn't say it's typical. Depending on the case,
24 sometimes we get a whole version produced all at once. Other
25 times we will sometimes get a partial production and then get

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1 multiple productions after that, but even in that case, the
2 additional source code we get is related to a specific version
3 of the system. So even though we get it over time, we can say
4 that that source code was related to this version that operated
5 over a certain time period or a specific point in time.

6 Q. And do you know whether the Rightscorp source code changed
7 over time?

8 A. My understanding is that it did.

9 Q. And what's that based on?

10 A. Mostly -- well, it's based on two things. The first is
11 that I also received some source code production from
12 Rightscorp that related to the operation of the system in 2013,
13 but I've also seen deposition transcripts from Mr. Boswell,
14 who's Rightscorp's lead developer, who stated something to the
15 effect that he was changing the source code on a daily basis as
16 he was developing it.

17 Q. So given the way you received the source code, were you
18 able to analyze the entire Rightscorp system?

19 A. The only way I was able to analyze the system was by
20 granting the favorable assumption that, for instance, for the
21 2015 production, that all that code operated together at one
22 instant in time.

23 Q. And again, that's just an assumption. You don't know
24 that?

25 A. I don't know that, and my understanding is I can't know

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1 that because there are no historical versions that have been
2 preserved.

3 Q. And the code that you received in June and July of this
4 year, was that everything you needed to see to analyze the code
5 or to analyze the system?

6 A. It was not.

7 Q. Were there other things you requested?

8 A. Yeah. In particular, there were a few database tables
9 that I wanted to see because those database tables held the
10 actual records that were generated by the software, and so in
11 order to verify that the software is working correctly, I
12 wanted to see some of those tables. I did get some, but I did
13 not get all the tables that I requested.

14 Q. And in addition to the 2015 Rightscorp code that you've
15 talked about, did you receive any older portions of the
16 Rightscorp code?

17 A. Yes. I think I alluded to that a bit earlier. There was
18 a production, I believe I received it around July 15 or 16, and
19 that production was related to two partial versions of the
20 Rightscorp system in 2013.

21 Q. And when did you -- you issued an expert report in this
22 case, an initial expert report, right?

23 A. I did.

24 Q. And what was the date on that?

25 A. I submitted that on July 10, 2015.

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1 Q. And when did you receive this -- these pieces of the older
2 code that you just talked about?

3 A. I believe it was on July 15 and 16, so five and six days
4 after.

5 Q. And then did you subsequently issue a supplemental report?

6 A. I did, yes.

7 Q. And what was the date on that?

8 A. That was submitted on July 31, 2015.

9 Q. So the code related -- the 2013 code that you saw, did
10 that tell you how the Rightscorp system operated in 2013?

11 A. I couldn't tell how the whole system operated based on
12 just that source code.

13 Q. Can you elaborate on that a bit? Do you understand the
14 different parts of the Rightscorp system, at least as
15 Rightscorp describes it?

16 A. Sure. I can break it down by part.

17 Q. Please.

18 A. So the five parts that we've heard about, the first one is
19 related to the actual acquisition from copyrights holders of
20 the songs that the Rightscorp system is going to monitor. So
21 that's the first part. My understanding from deposition
22 testimony is that in 2013, that was a manual process, and my
23 understanding is also that there was no documentation of that
24 manual process.

25 The second aspect of the Rightscorp system was that

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1 upon finding a song in a particular torrent, the Rightscorp
2 system would then try and check if that song was a song that
3 the Rightscorp system thinks it is based on the file name. My
4 understanding is that in 2013, that process was also a manual
5 process and that there's also no documentation of that process.

6 The third aspect is actually observing behavior on
7 Rightscorp's -- or, I'm sorry -- on BitTorrent's swarms, and
8 there was some source code produced for that. There was a
9 historical version of Test5.java produced and a few other
10 files.

11 The fourth aspect of the system is the actual
12 generation of notices based on the observations that the
13 Rightscorp system made, and there was no source code produced
14 for that in 2013.

15 And then the final aspect of the system is
16 potentially for some of the notices, downloading actual samples
17 of the files at issue. For the 2013 production, there was a
18 historical version of the SampleIt2.java produced, but my
19 understanding from deposition testimony is also that that code
20 was not executed in 2013.

21 Q. Okay. So the five components you've talked about, how
22 many were represented in the 2013 code?

23 A. Of those five components, I received source code
24 production for two of them, and for only one of them was that
25 code actually operative at that time.

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1 Q. And did you receive anything else in addition to the
2 historical code you already talked about, any other files or
3 code?

4 A. Yeah. There were a few other files that were produced,
5 and they were files that, I understand, again, from deposition
6 testimony from Mr. Boswell, that they were just test files he
7 was using. So, for instance, there was a file called
8 Test2.java, and that was, my understanding is, his way of
9 exploring the different messages that were sent between peers
10 over the BitTorrent protocol. And there were other files
11 produced like that as well.

12 Q. And you described those as test files. What does that
13 mean?

14 A. So this is from Mr. Boswell's testimony. My understanding
15 is that he meant that to mean these were files that wouldn't
16 actually be part of the system but were just for his own
17 exploration to figure out how things worked so that he could
18 potentially incorporate parts of those explorations into the
19 system.

20 Q. So I want to shift gears and talk about version control,
21 which the jury has heard a little bit about.

22 A. Okay.

23 Q. Are you familiar with version control programs?

24 A. Sure. The one I'm most familiar with is Git, which is a
25 free, open source version control program.

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1 Q. You were here on Tuesday, and you heard Mr. Boswell
2 testify, right?

3 A. I did.

4 Q. And did you hear him reference something called GitHub?

5 A. Yes.

6 Q. Are Git and GitHub the same thing?

7 A. They're not. So Git is the version control program that
8 you can run in order to keep track of the versions of your
9 software or other documents that you want to maintain different
10 versions of. GitHub is a Web site that you can post freely any
11 repositories that you have created for Git. So if you're
12 managing your software in Git, you can then share it with the
13 world, say it's an open source project, over GitHub.

14 But you don't have to use GitHub to use Git. You can
15 use Git just on your private computer to maintain versions of
16 software that you don't want to share with anybody. You don't
17 even need to be connected to the Internet to use Git.

18 Q. Are there benefits to using version control?

19 A. Yeah. The primary benefit is that you effectively give
20 yourself a time machine where you can go back in time and see
21 how a previous version of your source code worked in its
22 entirety.

23 Q. Can you elaborate on that a bit?

24 A. Sure. So a reason you might want to do that, for
25 instance, I use Git when I'm doing all sorts of things.

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1 Whenever I'm maintaining source code, or even for this case, I
2 was maintaining versions of my expert reports in Git as I was
3 writing them. Just in case, for instance, with the expert
4 report, if I maybe delete a paragraph and realize a few days
5 later, oh, I actually really wanted that paragraph back, I
6 could go back in time and see exactly what paragraph I had
7 written and then extract information out.

8 In terms of software development, one way that this
9 comes up is maybe I see the data that my software is producing,
10 and I look back on it and see, well, gosh, a year ago, there
11 was this data that was produced, and it doesn't seem right. So
12 I need to figure out why that happened, but I've changed the
13 source code since then, so how can I figure it out?

14 If I'm maintaining my software with version control,
15 I can just go back in time, recreate the system as it was
16 exactly at that point in time, and figure out exactly what the
17 problem was.

18 Q. Is there any burden to using a version control system?

19 A. So the first aspect of that is Git is free. There are
20 other free examples. There is sort of a bit of an
21 administrative cost to just learning how to use it, but, you
22 know, these are open source programs, and they're designed to
23 be used, so there's a lot of documentation to figure out how to
24 use them.

25 Once you figure out how to actually use them, it

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1 probably takes you maybe a minute or two per day, and it's just
2 at the end of the day, you say these are the source code files
3 that I've changed, maybe I add a comment about what the changes
4 were that I made, and then you just run the command, and the
5 system takes care of it for you.

6 Q. It's been suggested that maybe version control is only
7 used for large projects with lots of developers. Do you agree
8 with that?

9 A. No. I've used it for my own personal projects. For
10 instance, there was an Android application I developed a year
11 or two ago, and that was just me working on that Android
12 application, and I used Git for that project just so I had a
13 record of all the changes that I had made.

14 Q. Do you use it at Scvngr, with no vowels?

15 A. Yes. Yes, I did. There I was working with one other
16 developer, and at that point in time, I wasn't that familiar
17 with Git, and neither was the guy I was working with, but in
18 the first day or two, the CEO came in and said, guys, we really
19 need to use this because, you know, otherwise, we're just kind
20 of groping in the dark to figure out what we've been doing over
21 time. So from day one, you need to do this.

22 So we learned how to use Git, and then after we
23 learned how to also develop for the Android framework, we
24 checked in our first versions to get, you know, the first data
25 we started developing.

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1 Q. And did that get in the way of your development work?

2 A. No. It actually made it better, and the reason for that
3 was twofold. The first is that it made -- it forced us to be
4 disciplined about the changes we were making and the
5 documentation about the changes we were making, and also, you
6 know, I did find bugs in my programs that I had made. I could
7 go back in time and see, well, I had made this assumption when
8 I programmed this file, but now that assumption isn't true any
9 longer, and I can see this change and fix it now.

10 Q. And you said you used Git in this case, right?

11 A. I did to maintain versions of my expert reports.

12 Q. Okay. Can you think of any reason not to use version
13 control?

14 A. Well, so I discussed the cost and the benefit. In my
15 opinion, the cost of using a version control system is trivial,
16 and the benefit is that you get a really easy way to maintain
17 versions of whatever documents that you're working on. So the
18 only reason I can think of is if you didn't value maintaining
19 versions of whatever documents you're maintaining.

20 Q. All right. So let's shift gears again. Let's talk about
21 Rightscorp's system and your opinions with respect to the
22 system. What's your understanding of the number of Rightscorp
23 notices that are now at issue in this case?

24 A. Now at issue in this case? I believe there are about 1.8
25 million notices at issue.

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1 Q. And when were those notices sent, approximately?

2 A. I believe they were sent in the time span between February
3 2012 and November 2014.

4 Q. And you understand that November 2014 is when the lawsuit
5 was filed?

6 A. Yes, that's my understanding.

7 Q. In your expert opinion, Mr. Rucinski, are there issues
8 with the reliability of the Rightscorp notices?

9 A. Yes.

10 Q. Can you describe those?

11 A. Sure. The first issue is that, as I've alluded to, we
12 don't have the source code for -- we don't have one version of
13 the source code for any of the notices over this time period
14 from February 2012 to 2014. So there's a record of some of
15 those notices, but I can't tell you exactly how they were
16 generated. In particular, I mean, the source code I received
17 in 2015, which is the most complete version of the Rightscorp
18 system over some period of time, is outside of this time span
19 from 2012 to 2014.

20 Q. And that affects all 1.8 million notices, right?

21 A. Yes, it does.

22 Q. So other than what you've just talked about, are there
23 other issues that affect the reliability of the notices?

24 A. Yes. So for approximately 1.4 million of the 1.8, the
25 only information that the Rightscorp system obtained from peers

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1 and BitTorrent swarms was information about the bitfield, which
2 is a way for a peer to represent to another peer which pieces
3 of the torrent payload they currently possess.

4 Q. And so -- and the reliability issue is that the system
5 only collected information from the bitfield?

6 A. Right. It collected nothing more than that.

7 Q. Can you elaborate on that?

8 A. Sure. Maybe I could give a refresher quickly about how
9 BitTorrent works?

10 Q. Please.

11 A. Okay. So let's suppose that I run a BitTorrent program on
12 my computer and I connect to the swarm. And recall that the
13 swarm is just a collection of peers that are potentially
14 sharing parts of files for a particular torrent payload.

15 So when my peer enters the swarm, the first thing it
16 gets from each of the other peers is a bitfield, and that
17 bitfield represents which pieces of the torrent payload the
18 other peers have. Now, you might think that's a little weird
19 that you just get the bitfield at the beginning. If those
20 peers get additional pieces of the torrent payload, they can
21 send another message over the BitTorrent protocol called a has
22 message, indicating which piece they have just acquired.

23 So after my peer has entered the swarm, there are
24 potentially many peers in the swarm. So now my peer has to
25 figure out which other peers it wants to communicate with and

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1 potentially share files.

2 So, for instance, my peer might see that this other
3 peer, based on the bitfield, has a lot of pieces that I don't
4 have, so maybe I want to communicate with that peer. Maybe it
5 sees a second peer and I see that my peer has a lot of pieces
6 that that peer doesn't have, so maybe I want to communicate
7 with that peer because it can benefit from talking with me.

8 So the way this happens is my peer would express
9 interest in a particular peer and say, hey, I want to share
10 some pieces of the file with you, and that peer might respond
11 and say, okay, let's share pieces.

12 Q. So you're talking about peers and communicating and
13 sharing. It sounds like you're talking about people doing
14 this.

15 A. Right. So the analogy -- it's easier to sort of explain
16 with people, but obviously, it's just computers communicating
17 with one another on the network.

18 Q. And so in the scenario you've just described, can a peer
19 indicate that it is not willing to share?

20 A. Sure. In fact, sort of the BitTorrent lingo, there's a
21 word for that called a leecher, and that's a peer that only
22 endeavors to receive pieces but never share with anybody else
23 in the swarm.

24 Q. And is Rightscorp a leecher?

25 A. Yeah, by definition. Their system only collects pieces of

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1 files from the swarm. It only downloads, and it never uploads
2 any pieces to other peers in the swarm.

3 Q. All right. So thank you for the refresher. It was good
4 for me, too.

5 So when we go back to -- going back to the issue of
6 the reliability of the Rightscorp notices, how does that play
7 into the reliability issues you identified?

8 A. Sure. So I had said that for 1.4 million of those 1.8
9 million notices, the issue was that nothing more was collected
10 than the bitfield. So one additional piece of information that
11 could have been collected was the message from those peers that
12 indicated that they wanted to share.

13 The messages over the BitTorrent protocol for this,
14 like for my peer, if I express interest in another peer in
15 sharing with them, I send an interested message, and then that
16 peer can reciprocate and send an unchoke message, which
17 indicates that it's willing to give me pieces.

18 So the Rightscorp system could have maintained
19 records of those unchoke messages from peers, but it stopped at
20 just getting the bitfield information.

21 Q. How difficult would it have been for the Rightscorp system
22 to take that extra step?

23 A. Well, it's just, it's just one extra step. I don't think
24 it would be very difficult at all. In fact, as I alluded to
25 earlier, there was some experimental test code that had been

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1 produced from the 2013 period, and that code actually had all
2 of the BitTorrent messages laid out, and so really it would
3 just be adding stuff to the system that says after I get the
4 bitfield, let me just wait around a little bit longer, express
5 some interest in the peer, and see if reciprocates, and they
6 can record that action.

7 Q. And that extra step would just confirm that the peer was
8 actually willing to share what it had?

9 A. Yeah, that's what it would confirm.

10 Q. If you were asked to write code for that step, could you
11 do it?

12 A. Sure. Java is my most proficient programming language,
13 and the system is written in Java, so yeah.

14 Q. How long would it take you?

15 A. Well, I'd probably spend about a day just sort of
16 experimenting and making sure I understood how things worked.
17 Then maybe I'd spend another day or two coming up with sort of
18 a prototype system, and then after that, I'd probably test it
19 for another day or two, and I'd do the testing sort of separate
20 from the system in operation just as good practice. Then after
21 I tested it, I would spend probably a day just polishing it up
22 and making sure that it was really ready for the production
23 environment.

24 So all in all, I guess it's about a week.

25 Q. All right. So you -- again, back to your testimony that

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1 for 1.4 million of the notices, the system just collects
2 information from the bitfield. What other steps could it have
3 taken other than what you've just identified?

4 A. So the other step that the Rightscorp system could have
5 taken for those notices is to also actually download a file
6 from the peer that it had identified.

7 Q. And is that what's been referred to as the SampleIt2
8 function?

9 A. Yes. In the Rightscorp system, that is programming -- or
10 a file that has source code in it that's purpose is to download
11 specific files at specific torrent payloads for specific peers.

12 Q. And when do you understand that Rightscorp started
13 sampling?

14 A. I believe at least related to the issues in this case,
15 that happened in February -- or started in February 2014 and
16 ended in August 2014.

17 Q. And do you know if there was any sampling in 2012?

18 A. My understanding is that there was not.

19 Q. Do you know if there was any sampling in 2013?

20 A. My understanding is that there was not then, either.

21 Q. The sampling that you have seen that did occur, were there
22 issues with the sample?

23 A. Yeah, there were.

24 Q. Can you talk about that?

25 A. Sure. So the first issue is recall that the sampling

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1 occurred in the 2014 time period, and I have no production of
2 any source code from the Rightscorp system during that time
3 period, so I can't evaluate how those samples were created even
4 if I have some sort of record that indicates some information
5 about them.

6 Q. Are there any other issues you observed with the sampling
7 that Rightscorp did?

8 A. Sure. So Rightscorp produced some of the samples to me,
9 and I found some errors in the samples. In particular,
10 sometimes the Rightscorp system would think that it would be
11 downloading a music file, but it instead would grab a file that
12 wasn't a music file. So it would grab a PDF or an image and
13 associate it with that music file.

14 Q. How many examples did you see of that issue?

15 A. So I found approximately 800 examples where the Rightscorp
16 system would have been expected to download a music file but it
17 downloaded some other type of file.

18 Q. And do you know if any of those misidentified files
19 resulted in notices being sent?

20 A. Sure. So there is one example of an image that I found
21 where that image was actually downloaded 11 times. It was for
22 the same file in the same torrent payload, but related to that
23 specific file in that specific torrent payload, there were 190
24 notices generated.

25 Q. So this was an image that was misidentified as a song?

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1 A. Right. The system was designed to download a song to
2 verify this observation of potential infringement and instead
3 downloaded an image.

4 Q. Did you identify any other issues with the sampling that
5 Rightscorp did?

6 A. Yes. So in the samples that Rightscorp produced and the
7 samples that they have cited that are still at issue in this
8 case, there's a number of samples that are redundant, and what
9 I mean by that is they really only need to download a single
10 sample for each observation of a file in a particular torrent
11 payload, but sometimes they downloaded multiple samples from
12 that particular instance because the software is sort of
13 designed to just pick some of those records to download from,
14 and sometimes it downloads more than once.

15 So all in all, there were approximately 9,000 such
16 redundant samples that were downloaded.

17 Q. All right. So we've talked now about sampling. Are there
18 any other reasons to question the reliability of the Rightscorp
19 notices in your opinion?

20 A. Yes, there are.

21 Q. Can you elaborate?

22 A. Sure. I think the 10 percent bitfield functionality has
23 already been discussed, so that's, that's really the issue
24 there.

25 Q. Yeah. So the jury has heard a little bit about the 10

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1 percent bitfield, but could you explain what it means?

2 A. Sure. So I already explained how the Rightscorp system
3 looks at the bitfields that are returned from the different
4 peers, and when the system does this, it always maintains a
5 record for each bitfield even if that bitfield in the version I
6 already discussed, even if that bitfield has less than 100
7 percent of the pieces represented.

8 So the 10 percent functionality looks back at those
9 records, and for the records that indicate that as little as 10
10 percent of the bit- -- sorry, of the torrent payload was
11 represented in the bitfield, then the system will flag those
12 particular peers as notices should be sent out to those peers.

13 Q. Would it help to see a slide as we're talking about this
14 to illustrate it?

15 A. Sure, yeah.

16 Q. Can we get slide 1, Michael, please?

17 So, Mr. Rucinski, this was a slide that was actually
18 prepared by plaintiff's expert, Ms. Frederiksen-Cross?

19 A. Yes.

20 Q. And you've seen it before?

21 A. I have, yeah.

22 Q. What does this slide show?

23 A. So generally the slide shows a swarm, where there are
24 multiple peers in the swarm, and you can see that different
25 peers in the swarm have different percentages of the torrent

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1 payload. So, for instance, peer 2, it has two of the sort of
2 quadrants filled in for the green music symbol there, so it has
3 50 percent of that torrent payload, or has represented that.

4 Peer 3 represents that it has 100 percent of the
5 torrent payload, and, for instance -- did I say peer 6? I
6 meant peer 3 over there. But peer 6 has 25 percent of the
7 BitTorrent payload represented in the bitfield.

8 Q. And peer 3 has 100 percent?

9 A. I'm sorry, peer 3, yeah, does have 100 percent.

10 Q. So if the 10 percent threshold is turned on in the
11 Rightscorp system, which peers on this diagram will be
12 identified as infringers?

13 A. So it would be all the peers in this diagram, and that's
14 because each and every one of these peers possesses at least 10
15 percent of the BitTorrent payload as represented in the
16 bitfield that it sends to the Rightscorp system.

17 Q. And the Rightscorp system will send notices to all of
18 these peers?

19 A. Yes, after it makes that observation.

20 Q. But it's possible, isn't it, for the torrent payload to
21 include not just copyrighted songs, but other things, too?

22 A. Sure. So torrent payloads can contain any sorts of files.
23 It can contain music or texts or PDFs or images or movies. It
24 can also, you know, I think an example that maybe has been
25 already brought up in this case is discographies of music can

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1 be shared as well.

2 So the issue here is that if you look at peer 6, even
3 though the Rightscorp system will check whether it has at least
4 10 percent of the bit-, 10 percent of the bitfield representing
5 10 percent of the torrent payload, it doesn't check whether
6 those pieces of the torrent payload correspond to the files
7 that are at issue that the Rightscorp system is trying to
8 monitor.

9 So even in the case of a discography, if the
10 Rightscorp system is only looking to monitor certain songs,
11 there's a possibility that it will generate notices for a peer
12 that has never represented that it had any of those songs in
13 the torrent payload.

14 Q. So for peer 6, it has more than 10 percent. It's got 25
15 percent of the payload, right?

16 A. That's right.

17 Q. It will be identified as an infringer, right?

18 A. Yes. If the 10 percent functionality is turned on, yeah.

19 Q. Even if no part of that 25 percent corresponds to a
20 copyrighted song?

21 A. The Rightscorp system does not check that, so yes.

22 Q. What if there's more than one copyrighted song in the
23 payload? How does that affect notices?

24 A. Sure. So when a peer is identified as a peer that notices
25 should be sent to, there's one notice sent for each song that

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1 is monitored in the torrent payload.

2 Q. Again, even if the portion that peer has doesn't
3 correspond to any of those songs?

4 A. That's right. And the 10 percent example, if that's
5 turned on, that would be the case.

6 Q. All right. So when the 10 percent is turned on, what's
7 the ultimate effect of that?

8 A. Overall, it means that more peers will be identified as
9 peers that notices should be sent to, so more notices will be
10 sent.

11 Q. More notices will be sent?

12 A. More notices, yeah.

13 Q. How many more?

14 A. I can't say for sure. It could be a lot. I don't know.

15 Q. In your expert opinion, does the 10 percent -- how does
16 the 10 percent threshold affect the reliability of the
17 Rightscorp system?

18 A. Well, it makes it less reliable. That's a pretty good
19 reason why -- I mean, if people are getting notices for songs
20 that they never represent anything about possession, that makes
21 the system unreliable.

22 Q. Could Rightscorp have confirmed that the 10 percent in the
23 bitfield corresponds to a copyrighted work or song?

24 A. Sure. All that information necessary to do that is in the
25 .torrent file that you need in order to connect to the swarm.

C. Rucinski - Direct

1582

1 In fact, that's how certain BitTorrent programs will allow
2 users to select that they want to download only specific files
3 from the torrent payload.

4 Q. So you can determine which pieces correspond to which
5 songs?

6 A. Yeah, from the information in the .torrent file.

7 Q. But Rightscorp system doesn't do that?

8 A. It doesn't.

9 Q. Could it have done that?

10 A. Yeah, it could have.

11 Q. How hard would that have been?

12 A. It would not be hard. In fact, there are already certain
13 portions of the Rightscorp code that I've seen that already
14 make this calculation. For instance, I think we've talked at
15 least a little bit about the verification sort of songs where
16 the Rightscorp system wants to check that the song that it
17 thinks is in the torrent payload is actually the song that it
18 purports to be. So in order to do that, it needs to download
19 that specific song from that specific torrent payload, and to
20 do that, it needs to download the specific pieces.

21 So there's already code in the Rightscorp system that
22 says, calculate for me the pieces that correspond to this
23 specific file.

24 Q. Is that what we've heard referred to as the SampleIt3
25 function?

C. Rucinski - Direct

1583

1 A. Yes. That's a file that has that arithmetic in it.

2 Q. So you could use that same basic function to address the
3 10 percent issue?

4 A. Yeah. You just do that same calculation, and instead of
5 downloading the file, you just check if the pieces in the
6 bitfield correspond to that particular file that you're
7 interested in.

8 Q. How is the 10 percent bitfield implemented?

9 A. Right. So I alluded to this a little earlier, and recall
10 that the Rightscorp system maintains a record of each bitfield
11 that it receives, even if that bitfield is -- well, it doesn't
12 matter what percentage. It always maintains a record of it.

13 So the way the 10 percent is implemented is there are
14 two files. The first file is FullFileBeing.txt, and this is a
15 file that looks back at the records of the bitfields and then
16 identifies particular bitfields and the peers associated with
17 them that should have a notice or multiple notices generated if
18 the percentage is above 10 percent.

19 There's also a second file which calls that first
20 one. It calls the 10 percent functionality, and that is
21 basically a way to automate that 10 percent functionality so
22 that it executes approximately every 15 minutes or so.

23 Q. What is that second file called?

24 A. I believe it's FullFileFix.txt.

25 Q. And you said that automates the stored procedure?

C. Rucinski - Direct

1584

1 A. Yeah. The stored procedure is the 10 percent
2 functionality. That's the first file I talked about.

3 Q. Can it also be run manually?

4 A. Yes. The 10 percent functionality, the file implementing
5 the 10 percent functionality can also be run manually from sort
6 of a console that a user could use.

7 Q. Okay. So the automation of it can be turned on and off?

8 A. Yeah, that's right. In fact, I believe Mr. Boswell,
9 Rightscorp's lead software developer, has testified to that.

10 Q. All right. So these two files you've talked about,
11 FullFilesBeing and FullFileFix -- I think I have those right --
12 when did you receive those?

13 A. So FullFileBeing.txt, that's the one I received on July 8,
14 2015. You recall that's the one that implements the 10 percent
15 functionality. And that was two days before my first expert
16 report was due.

17 And then FullFileFix.txt that automates the first
18 file, I received that on July 9, the day before my first expert
19 report was due.

20 Q. And based on the code you had seen up to that point from
21 Rightscorp, did you know those two files existed?

22 A. I didn't, and that's a little unintuitive, but in the
23 Rightscorp system, there were no reference to these files, and
24 the reason for that is because they were implemented sort of on
25 the side to look back at data that had already been created,

C. Rucinski - Direct

1585

1 and so there weren't any references, and so the only way that I
2 was -- that I became aware of them was from deposition
3 testimony.

4 Q. Would there have been any way for you to know those files
5 existed?

6 A. There were no references in the code, so no.

7 Q. And you understand, Mr. Rucinski, that one of those two
8 files, FullFilesFix, has a date in the file, right?

9 A. Yes, that's my understanding.

10 Q. Do you remember what that date is?

11 A. I believe it's December 2, 2014.

12 Q. What does that date in the file mean?

13 A. So that date is interpreted by the database program that
14 runs the automation, so that database program will look at this
15 file and say, okay, is my system clock date after this date?
16 And if so, then I'll run this automation every 15 minutes.

17 Q. Okay. So it's just a message to the database?

18 A. It's, it's an instruction to the database that the
19 database interprets.

20 Q. Thank you.

21 All right. So we've talked about the reliability
22 issues you identified with Rightscorp's detection of alleged
23 infringement. Let's shift now to how those detections turn
24 into notices, okay?

25 A. Sure.

C. Rucinski - Direct

1586

1 Q. So in the 2015 version of the Rightscorp codes you
2 received, how were the notices generated?

3 A. So generally the way this happens is recall that the
4 Rightscorp system identifies peers for notices to be sent to,
5 and then for each work that is monitored in that, in the
6 corresponding torrent, it will send one notice per work.

7 Q. That's for the current -- that's for the 2015 version of
8 the code?

9 A. For the 2015 version, yes.

10 Q. How were notices generated during the, what we've called
11 the relevant time period, February 2012 through November 2014?

12 A. Right. So I don't know because I've never seen source
13 code that was in production over that time period.

14 Q. Okay. So you don't know how notices were generated in
15 2012?

16 A. I don't.

17 Q. And you don't know how notices were generated in 2013?

18 A. No, I don't.

19 Q. But you said before you did get some files from 2013,
20 right?

21 A. Right. There was some source code production in 2013, but
22 none of the files produced related to the generation of the
23 notices.

24 Q. And you don't know how notices were generated in 2014?

25 A. No, I don't.

C. Rucinski - Direct

1587

1 Q. Are there reliability issues with how the Rightscorp
2 system sends notices over time?

3 A. Yeah. And I think this is best illustrated by an example.
4 So in the 2015 version of the code, so suppose that there's
5 someone who puts a file in, in the torrent and then connects to
6 a BitTorrent swarm, a single file, and then they go on vacation
7 for, say, 30 days. While they're gone, if the Rightscorp
8 system is monitoring them, that person could potentially
9 receive a notice of infringement each and every day.

10 In the 2015 version, it's true that there's only one
11 notice per day per IP address per file name, but still, you
12 know, on day one, the system checks for a certain circumstance,
13 and then day two observes the same circumstance, sends a second
14 notice, on day three, sends a third. When that person comes
15 back from vacation, they potentially have 30 notices, each
16 asking for \$20, and that's all for observing the same
17 circumstance.

18 Q. Okay. So that's how the system currently works, where
19 it's one notice per day?

20 A. Well, that's the 2015 version that was produced earlier.

21 Q. I apologize, the 2015 version that you've seen, that's how
22 it works. It's one notice per day.

23 A. Yes.

24 Q. Did it always operate that day?

25 A. No. My understanding is it didn't.

C. Rucinski - Direct

1588

1 Q. And how do you know that?

2 A. I've seen specific notices, specific sets of notices that
3 were generated in 2012 where those notices were sent over the
4 course of one day, and that was to the same peer for the same
5 file from the same torrent.

6 Q. And did you prepare a slide that helps illustrate that?

7 A. Yeah, there's an example.

8 Q. Michael, could we have slide 2, please?

9 What does that slide show, Mr. Rucinski?

10 A. So this is an example, the particular IP address here is
11 actually from the amended complaint, I believe, and I think it
12 was also mentioned in Mr. Steele's testimony at this trial, and
13 what I'm showing here is -- it's a little difficult for me to
14 see the column heading, so I'll try and refer to them by number
15 as well. So, for instance, in the first column you are in,
16 this is the torrent hash, so this is the unique identifier for
17 the torrent that's at issue here.

18 The artist is the artist that the Rightscorp system
19 has associated with the file at issue. The title is the title.
20 The file name is the file name. The IP address -- thank you --
21 is the IP address of the computer that the notice was sent for.
22 The port is a further identifier for the computer. The iDate
23 field is the date that the circumstance was observed by the
24 Rightscorp system, and then the e-mail date -- and I apologize
25 for the way this is laid out; these are just the exact columns

C. Rucinski - Direct

1589

1 as they're spelled in the database -- the e-mail date is when
2 the notice was actually sent.

3 So if we could zoom back out? So you'll see that
4 each of these, what, six rows, the torrent hash is the same,
5 the artist is the same, title is the same, the file name is the
6 same, the IP and port are the same, the iDate is the same, and
7 the e-mail date is the same. So all six of these notices were
8 sent to the same IP address in the same port for the same file
9 from the same torrent.

10 Q. On the same day?

11 A. On the same day.

12 Q. And do you know when that -- when did that change from
13 doing it this way to the way that it apparently does it today?

14 A. I don't know because I don't have a record of that change.

15 Q. Mr. Rucinski, have you analyzed the volumes of notices
16 that Rightscorp sent to Cox over time?

17 A. Yes, I've taken a look at those as well.

18 Q. And do you have some slides illustrating that?

19 A. I do.

20 Q. I think it's slide 3, please, Michael.

21 What does this slide show?

22 A. So this first slide, the data that went into creating
23 this, this is for every record of a notice that was sent in the
24 database that I received up until November 26, 2014. And this
25 was just a cumulative graph over time. So all of these were

C. Rucinski - Direct

1590

1 sent to Cox from Rightscorp, but there's no further filtering
2 on it.

3 Q. No further filtering on it?

4 A. No further filtering.

5 Q. Could we look at the next slide, please?

6 A. So this slide is just an overlay of the previous slide,
7 but the green area we have here, this is for the same set of
8 notices. This is just the notices that were sent from
9 Rightscorp to Cox on behalf of BMG.

10 Q. Okay. And this is a little hard to see. I just want to
11 make sure, what are the numbers on the left side there for
12 people whose eyesight is like mine?

13 A. Yeah. So this scale is by 2 million, and the top is 12
14 million.

15 Q. Thank you.

16 Next slide, please, Michael?

17 And what does this show?

18 A. So this slide, the data input here, this is also, you
19 know, operating on the same data all the records of the notices
20 except this has been filtered to only include the notices that
21 are associated with the asserted works that are currently in
22 this case.

23 Q. Next slide, please?

24 So what does this slide show?

25 A. This slide is a rehash of that first slide, so again, this

C. Rucinski - Direct

1591

1 is all the records of the notices that were sent but no further
2 filtering beyond that, and this is just organized by day rather
3 than cumulatively over time.

4 Q. There are some pretty significant spikes on this chart,
5 right?

6 A. Yeah. There's a few that exceed 100,000 notices on a
7 single day.

8 Q. 100,000 in a day?

9 A. Yeah, that's right.

10 Q. And it looks like a number of those are near the end of
11 2014. Is that right?

12 A. Yes, that's correct.

13 Q. Is that right before the lawsuit was filed?

14 A. That's my understanding, yeah.

15 Q. Okay. And the next slide?

16 And what does this slide show, please?

17 A. So this shows the, sort of the increase in volume that
18 occurred towards the end of 2011, where before this time
19 period, there were generally something on the order of hundreds
20 of notices that were sent, and then it spikes up to this, you
21 know, several thousand thereafter.

22 Q. Yeah. And some of these spikes, how many notices does
23 that represent in a day?

24 A. Yeah. So there are some spikes where it's over 20,000,
25 for instance.

C. Rucinski - Cross

1592

1 Q. Thank you. That's fine for the slides.

2 So, Mr. Rucinski, in summary, in your expert opinion,
3 is the Rightscorp's system reliable?

4 A. Based on what I've seen, no.

5 Q. And are the Rightscorp notices reliable evidence of
6 infringement?

7 A. Again, based on what I've seen, no, I don't think so.

8 MR. BUCKLEY: Thank you.

9 Pass the witness, Your Honor.

10 THE COURT: All right, thank you.

11 Mr. Caracappa, cross-examination?

12 MR. CARACAPPA: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. CARACAPPA:

15 Q. Mr. Rucinski, how are you?

16 A. Good. How are you?

17 Q. We've met before, right?

18 A. We have.

19 Q. I took your deposition?

20 A. Yes, I remember.

21 Q. Okay. How much do you make an hour?

22 A. How much do I make an hour?

23 Q. Yes. I'll rephrase the question. What's your hourly
24 rate?

25 A. Right. So the company I work for is compensated at \$340

C. Rucinski - Cross

1593

1 an hour for my time on this case.

2 Q. And that's Elysium Digital?

3 A. Well, Elysium was acquired by Stroz Friedberg, so I guess
4 it depends on the time period, but the rate that either company
5 was compensated hasn't changed.

6 Q. Do you know how much Elysium Digital/Stroz Friedberg has
7 been paid for its work on this case to date?

8 A. I don't know the exact number, but it's probably just a
9 little bit less than \$200,000.

10 Q. Okay. You submitted an updated CV; is that right?

11 A. I did.

12 Q. Okay. And you graduated from college in 2010; is that
13 right?

14 A. That's correct.

15 Q. Five years ago?

16 A. Yeah.

17 Q. Okay. The code at issue in this case is Java and SQL,
18 right?

19 A. Yeah. I guess JSP -- I mean, you could consider that a
20 subset of Java, but generally, those are the languages
21 involved.

22 Q. JSP, okay.

23 A. Yeah.

24 Q. And you have about ten years' experience with Java/JSP?

25 A. Yeah, writing and analyzing.

C. Rucinski - Cross

1594

1 Q. Have you ever written any articles on Java?

2 A. No, none that were published.

3 Q. Or JSP?

4 A. No.

5 Q. Or SQL?

6 A. No.

7 Q. Have you ever written any articles on code?

8 A. None that were published.

9 Q. Have you ever written any articles on evidence collection?

10 A. No, none that were published.

11 Q. I believe you said you received something, my notes are
12 unclear, the certificate of digital evidence collection in
13 2015; is that right?

14 A. Yeah. That was in April.

15 Q. In April. Is that before you were retained or after you
16 were retained?

17 A. That was before.

18 Q. Before. How long before?

19 A. I don't remember. I mean, I was retained at the end of
20 April, and the certification was around the end of April, also.

21 Q. So you received --

22 A. So it was probably about the same time actually.

23 Q. About the same time?

24 A. Yeah.

25 Q. Okay. You were retained by Cox's counsel in this case,

C. Rucinski - Cross

1595

1 right?

2 A. Yeah, by Fenwick & West.

3 Q. And you were retained to rebut Ms. Frederiksen-Cross's
4 opinions that the Rightscorp system was accurate and reliable,
5 correct?

6 A. I mean, that's generally true, but in April, that report
7 hadn't been issued, so we were just retained to work on the
8 case.

9 Q. Okay. In connection with that engagement, you prepared
10 two reports, I think you testified to?

11 A. That's correct.

12 Q. And Cox's counsel assisted you with preparing those
13 reports, right?

14 A. Yeah.

15 Q. Ms. Frederiksen-Cross opined on the Rightscorp system and
16 how it worked, right?

17 A. She did.

18 Q. And when it comes to that system, you and
19 Ms. Frederiksen-Cross actually agree on a fair amount, right?

20 A. Yeah, we agree on certain things.

21 Q. You agree generally on how Test5.java works, right?

22 A. Yeah.

23 Q. You agree that sometime during the relevant time period,
24 the process was manual, right?

25 A. I'm sorry, the process?

C. Rucinski - Cross

1596

1 Q. Strike that.

2 You talked about the Rightscorp system as in five
3 parts, right?

4 A. Yeah, I characterized it that way.

5 Q. And that's how Ms. Frederiksen-Cross characterized it,
6 too, right?

7 A. That's why I characterized it as five parts. That would
8 be easier to understand.

9 Q. And also Mr. Boswell, right?

10 A. I was only here for part of his testimony, so I'm not
11 sure.

12 Q. Were you here for Ms. Frederiksen-Cross's testimony?

13 A. I was not.

14 Q. You talked about the source code production, right, and
15 how it was produced over various times throughout the discovery
16 period; is that right?

17 A. That's right.

18 Q. And that was because oftentimes, you said you needed
19 additional code, right?

20 A. Well, when we asked for more production, more code was
21 produced, but not necessarily as part of the same version we
22 had previously received, yes.

23 Q. You don't have any indication that Rightscorp
24 intentionally withheld code from you, do you?

25 A. No, I can't say they intentionally withheld anything.

C. Rucinski - Cross

1597

1 Q. Okay. So if Rightscorp had the code, it's your
2 understanding they gave it to you, right?

3 MR. BUCKLEY: Your Honor, it requires him to
4 speculate as to what they had.

5 THE COURT: Sustained.

6 BY MR. CARACAPPA:

7 Q. Okay. You compared the Rightscorp system to Windows 7 and
8 Windows 10, right?

9 A. Well, I compared it in that it was different because there
10 was no established version for any period of time.

11 Q. But the Rightscorp system is not really like a Windows, is
12 it? I mean, you can't buy it in a box at Home Depot, right?

13 A. Well, you can't, but it's a software system, and even
14 software systems that are maintained internally can have
15 version numbers.

16 Q. It's a software system that is developed and written using
17 XPS software; is that right?

18 A. I'm sorry, XPS software?

19 Q. Yes. Have you ever heard of that?

20 A. Are you referring perhaps to XP, which Mr. Boswell
21 testified about?

22 Q. I am, yes.

23 A. Okay.

24 Q. XP programming, right?

25 A. Well, let me just clarify. It's not a type of software.

C. Rucinski - Cross

1598

1 It's more programming methodology, which I understand is a
2 subset of agile programming. Mr. Boswell did testify that he
3 is an adherent of this way of programming.

4 Q. And XP programming, oftentimes you don't use revision
5 control, right?

6 A. I think Mr. Boswell and I might disagree about this a
7 little bit because, like, I even found a reference in one of my
8 expert reports that talked about agile programming and how
9 revision control is important even in that case.

10 Q. At your deposition, I asked you if you had any experience
11 with XP programming, and you said you didn't, right?

12 A. I wouldn't say I'm in adherence to that method of
13 programming, no.

14 Q. I'd like to talk for a minute about some historical
15 versions of the code, all right?

16 A. Okay.

17 Q. You analyzed certain portions of the code as it was
18 produced over time, as we discussed, right?

19 A. Yes.

20 Q. All right. And in your supplemental report, you
21 classified some of the code as RCV1, right?

22 A. That's right.

23 Q. And RCV1 had modification dates ranging from September 3,
24 2011, to April 1, 2013, right?

25 A. I don't remember, but I'll take your word for it if it's

C. Rucinski - Cross

1599

1 in my report.

2 Q. Okay. It is. Thank you, sir.

3 And you classified certain portions of the code as
4 RCV2, right?

5 A. Yes.

6 Q. And RCV2 had a modification of September 9, 2013, right?

7 A. I'll again take your word for it if it's in my report.

8 Q. And then in your supplemental report, while you do note
9 some differences, you say that they operate in substantially
10 the same ways, right?

11 A. Could we clarify the -- the issue I'm having with that is
12 I don't think that applies to the entire Rightscorp system for
13 either of those productions. Those productions were only part
14 of the Rightscorp system. So for the pieces that were
15 produced, I believe there were some in my expert report that I
16 said did operate in substantially a similar way to the 2015
17 production.

18 Q. That's what -- I properly characterized what was written
19 in your report, correct?

20 A. As long as you're agreeing with what I just said, sure.

21 Q. You also analyzed the RC current, right?

22 A. That's what I referred to in my report, yes.

23 Q. All right. And RC current was produced prior to July 15,
24 2015, right?

25 A. The only issue I'm thinking about there was -- and

C. Rucinski - Cross

1600

1 granted, I don't think this was really relevant to the
2 analysis, but there was some code produced related to the
3 accounting aspects of the Rightscorp software, and I think that
4 was produced in early August.

5 Q. But that's not relevant here to this analysis, right?

6 A. Yeah. So apart from that, yeah, I think everything was
7 produced before then.

8 Q. Okay. And that's -- I can quote your supplemental report
9 if you'd like.

10 A. Please.

11 Q. Okay. It says, "I will refer to code that was produced by
12 Rightscorp before July 15, 2015, or that otherwise appears to
13 relate to the most recent version of Rightscorp's source code
14 that has been produced as RC current."

15 Okay?

16 A. Sure.

17 Q. All right. And then in your supplemental report, again
18 noting some differences, you state that RC1 and RC2 operate in
19 substantially the same way as RC current, right?

20 A. Yes. Though, again, I just want to clarify that. That's
21 not the whole Rightscorp system. Those are only the portions
22 that were produced.

23 Q. The portions that you analyzed, you say, operate in
24 substantially the same way, right?

25 A. As the 2015 production.

C. Rucinski - Cross

1601

1 Q. Thank you.

2 Can you put up Rucinski 1?

3 Brian, what was the exhibit that you went over with
4 Mr. Rucinski, the demonstrative? The graphic?

5 MR. BUCKLEY: Oh, the graphic? That's it.

6 MR. CARACAPPA: Thank you.

7 Q. Sir, I've heard a lot of "mays" and "possibles" when you
8 talked about this. This is the demonstrative you used to talk
9 about the 10 percent bitfield, right?

10 A. Yes, it's a demonstrative.

11 Q. Okay. At your deposition, you said you've seen no
12 evidence that the 10 percent bitfield code was run during the
13 relevant time period, right?

14 A. I don't think I had seen evidence one way or another on
15 that.

16 Q. Okay. And at your deposition, you said you had not seen
17 any evidence that it was run during the relevant time period,
18 right?

19 A. I think that's right. There was some evidence that that
20 could have indicated it, but I was never able to see it.

21 Q. One of the five parts you talked about was the acquisition
22 of copyrights. Do you recall that?

23 A. Yes.

24 Q. And you testified that some of that was done manually,
25 right?

C. Rucinski - Cross

1602

1 A. That's my understanding.

2 Q. That means by a person, right?

3 A. Yeah, a person entering in stuff into a spreadsheet or
4 table by hand.

5 Q. Well, there's going to be no code if a person does it
6 manually, right?

7 A. If that's -- well, there could be code that wasn't in
8 operation, but if that's how they're doing it, I mean, that
9 would be a way to do it at that time, sure.

10 Q. It would be?

11 A. You could do it that way.

12 Q. Okay. And then you talked about how the ingestion process
13 was also at some point done manually, and if they did it with a
14 person, it's possible there wouldn't be any code, right?

15 A. That's true.

16 Q. I think you talked about the number of notices that are at
17 issue in this case. Do you recall that?

18 A. Yes.

19 Q. And there are -- I don't have the exact number, but I
20 think it's 1,847,000-something, right?

21 A. I don't know if I can agree to a number with "something"
22 at the end, but it's approximately 1.8 million.

23 Q. Approximately 1.8 million.

24 A. Okay.

25 Q. How many notices in your expert report did you say were

C. Rucinski - Cross

1603

1 not accurate?

2 A. So the, the notices at issue in this case have changed
3 over time, so I actually don't remember in my expert reports
4 what I said about the numbers. They've changed.

5 Q. Do you remember the number of notices that you identified
6 as being inaccurate?

7 A. I think in my reports, I talk at least about all the
8 source code that wasn't produced at those times, and that's
9 definitely applicable to all of the notices, so --

10 Q. That's not the question I asked, sir. I asked you in your
11 expert report, did you discuss the number of notices that you
12 analyzed that were inaccurate?

13 A. I don't think I wrote down a number if that's your
14 question.

15 Q. Well, you talked about a couple here today. How many of
16 these notices?

17 A. Well, so let me just clarify. So this example was taken
18 from an example that has been used in the amended complaint.
19 The works here, like ZZ Top, for instance, is not an artist
20 that is currently one of the asserted works. So I think this
21 is outside the scope of my opinion for this trial.

22 Q. Okay. So these are -- you're not testifying about these
23 notices?

24 A. Well, I testified that they exist and they're reflective
25 of how the system worked, but I just want to make sure that

C. Rucinski - Cross

1604

1 you're not -- I mean, if you're talking about notices in that
2 1.8 million, I just want to clarify these are not in those
3 notices.

4 Q. Oh, these are not in the 1.8 million?

5 A. No, they're not.

6 Q. Did you identify any notices in your expert report in the
7 1.8 million that were inaccurate?

8 A. So I don't know how to answer that question because I
9 don't know what the set of notices was at that time and at this
10 time because they've changed. I can talk a little bit about
11 how recently they've changed if you like.

12 Q. How many notices have you seen that are inaccurate?

13 A. You're referring to the actual e-mails?

14 Q. Sir, I'm referring to the notices, right? You have -- I
15 have on the screen, it says, "Notices sent for same file
16 multiple times a day."

17 And when I heard you testify, the implication was
18 that this was a way that you determined that the code was
19 inaccurate. Now, I could be wrong. That's what I heard. So
20 now I'm trying to understand of the 1.8 million notices, how
21 many of those notices have you seen that indicated to you that
22 the system was inaccurate?

23 A. I believe all of them are not generated by a reliable
24 system, so I don't think any of them are reliable.

25 Q. Have you pointed out any single notice that you think is

C. Rucinski - Cross

1605

1 inaccurate?

2 A. Single notice. Well, I referred to 190 such notices that
3 were generated for samples where an image was downloaded, so I
4 don't know if that's close enough.

5 Q. 190?

6 A. 190.

7 Q. Okay. And then you talk about the full files. You said
8 that 800 were inaccurate, right?

9 A. I'm sorry, the full files?

10 Q. Yeah. I'll take a step back.

11 A. Okay.

12 Q. I'm moving on from the notices.

13 A. Okay.

14 Q. And we talked about how SampleIt2 downloads a sample of
15 the work, right?

16 A. Yes.

17 Q. And SampleIt2 downloaded in this case -- strike that.

18 SampleIt2 downloaded approximately 700,000 samples,
19 right?

20 A. Yes, I received two hard drives with approximately 700,000
21 samples on it.

22 Q. And you testified that 800 were inaccurate, right?

23 A. Yes, in the sense that, you know, there was a file
24 download that was not a song.

25 Q. Do you know if Cox ever asked to see the Rightscorp source

C. Rucinski - Cross

1606

1 code in 2012?

2 A. Do I know if Cox ever asked? I have no idea.

3 Q. Do you know if Cox ever asked to see the Rightscorp source
4 code in 2013?

5 A. I don't know.

6 Q. Do you know if Cox ever asked to see the Rightscorp source
7 code in 2014?

8 A. I don't know.

9 Q. Do you know if ever outside the context of this litigation
10 Cox challenged the accuracy of the Rightscorp source code?

11 A. I don't know.

12 Q. Dr. -- I'm sorry, Mr. Rucinski, are you aware that Cox
13 offered to forward on the Rightscorp notices if Rightscorp took
14 out what it considered to be a demand for payment?

15 A. I think I had read some court documents to that effect,
16 yeah.

17 Q. Okay. Were you here for Mr. Boswell's testimony?

18 A. Right here?

19 Q. Not on the witness stand but in the courtroom.

20 A. I was referring to Boswell being here. I was here for the
21 second day.

22 Q. You were here for the second day.

23 A. Yeah.

24 Q. And you heard Mr. Boswell testify that the 10 percent
25 source code was not used during the relevant time period,

C. Rucinski - Cross

1607

1 right?

2 A. If that was his testimony, I heard it.

3 Q. Mr. Rucinski, you were not here for Ms. Frederiksen-Cross,
4 right?

5 A. I was not, no.

6 Q. And you didn't see her give the presentation to the jury
7 about how the code worked, right?

8 A. I didn't see the presentation, but I did review her
9 slides, and I also reviewed the trial transcript for that.

10 Q. You reviewed her slides?

11 A. Yeah.

12 Q. And a trial transcript?

13 A. That's correct.

14 Q. And that's how you knew that she testified, right?

15 A. I don't think that was the only way, but it was a way to
16 know, yes.

17 Q. Okay. How else did you know she testified?

18 A. I believe counsel told me that she testified.

19 Q. Anything else?

20 A. No.

21 Q. Okay. Well, isn't that what Ms. Frederiksen-Cross did
22 with the Rightscorp source code? She didn't just look at the
23 code. She also spoke to Mr. Boswell, right?

24 MR. BUCKLEY: Requires him to speculate, Your Honor.

25 THE COURT: Overruled. He says he read the

C. Rucinski - Cross

1608

1 transcript, so we'll see if he recalls.

2 THE WITNESS: Well, at the very least in her expert
3 reports, I think she mentioned she spoke to Mr. Boswell.

4 BY MR. CARACAPPA:

5 Q. And she spoke to Mr. Steele?

6 A. I believe that's also disclosed in at least one of her
7 reports.

8 Q. And she looked at the Dashboard?

9 A. I believe that's also disclosed in one of her expert
10 reports.

11 Q. And she tested the Rightscorp system, right?

12 A. Yes. She ran a test where I believe it was just a couple
13 files where she shared them over BitTorrent and checked if the
14 Rightscorp system maintained a record of it.

15 Q. She ran a test, right, sir?

16 A. She ran a test.

17 Q. You didn't speak to Mr. Boswell, did you?

18 A. No, not directly.

19 Q. You didn't speak to Mr. Steele?

20 A. No.

21 Q. You didn't log onto the Dashboard?

22 A. I did not.

23 Q. In fact, you didn't even know you could log onto the
24 Dashboard, did you?

25 A. It wasn't presented as an option for my analysis, no.

C. Rucinski - Cross

1609

1 Q. And in your expert report, you don't talk about any tests
2 that you've run, right?

3 A. Sorry, I have to think back. That's a broad question. I
4 mean, it depends what you mean by test. I mean, I tested the
5 samples, for instance, so there were tests run there. There
6 were probably others. I was looking to verify, you know, the
7 reliability.

8 Q. You didn't run a test like Ms. Frederiksen-Cross did, did
9 you?

10 A. Well, that would have required me to ask Rightscorp to
11 monitor something I was doing, and, you know, I don't think I
12 have the blessing of BMG to share their copyrights, for
13 instance.

14 Q. Sir, just yes or no. You didn't run a test like the test
15 run by Ms. Frederiksen-Cross, right?

16 A. I did not run that test.

17 MR. CARACAPPA: Thank you. Your Honor, no further
18 questions.

19 THE COURT: Any redirect?

20 MR. BUCKLEY: No redirect, Your Honor.

21 THE COURT: All right. May Mr. Rucinski be excused?

22 MR. BUCKLEY: Yes.

23 THE COURT: All right. You're excused with our
24 thanks, sir. Please don't discuss the testimony you've given
25 with anyone until our trial is over, all right?

1 THE WITNESS: I will not. Thank you, Your Honor.

2 THE COURT: All right, thank you.

3 (Witness excused.)

4 THE COURT: All right, next witness?

5 MR. BUCKLEY: So, Your Honor, could we have a brief
6 sidebar?

7 THE COURT: Yes, sir.

8 (Sidebar on the record.)

9 MR. WARIN: Your Honor. I think I know the topic,
10 and I suspect this may not be brief.

11 MR. BUCKLEY: Let me preview it. Dr. Sullivan is
12 next. He is our damages guy. We weren't going to call him
13 today in light of events. We have him here. We can start, but
14 they just got his exhibits and demonstratives, so we haven't
15 even had a chance to talk about them.

16 So one option would be I know we have some argument
17 to do. We could do that. We can let the jury go home early
18 tonight, come in and start tomorrow, and I will continue with a
19 few witnesses tomorrow, Dr. Sullivan and Mr. Mencher, and then
20 we're done.

21 Or I can put Dr. Sullivan up now, we can do some
22 background, do a little bit of preliminary stuff, but it will
23 definitely carry over until tomorrow.

24 THE COURT: Do you have deposition testimony, any
25 more --

1 MR. BUCKLEY: No, Your Honor, because the objection
2 you sustained was all of the testimony. So there's nothing
3 else to do with that.

4 THE COURT: All right.

5 MR. WARIN: Your Honor, you're going to see a rare
6 moment of agreement. I think that Mr. Buckley originally
7 proposed about let's have argument on some of the other issues
8 and have Dr. Sullivan come tomorrow, because we just got these
9 today. They gave them to us early, we got them at 1:00 today,
10 but there are problems with both the demonstratives and the
11 exhibits that will have to be resolved. We haven't met and
12 conferred about that.

13 So I think that's a sensible solution.

14 THE COURT: Do you want to use them in the first
15 portion of his testimony?

16 MR. BUCKLEY: There are some that are going to come
17 up pretty quickly. We won't get very far.

18 THE COURT: The only problem is I have a docket
19 tomorrow morning at nine, and I'm not going to be free until
20 10:30.

21 MR. BUCKLEY: Okay.

22 THE COURT: And then we're going to have a discussion
23 about these, so we'd better let the jury come back at 11:00.
24 Does that give us time to do that in the morning?

25 MR. WARIN: That would. We actually may want to have

1 a discussion about some of Dr. Sullivan tonight before.

2 THE COURT: Oh, I'm assuming that you are going to
3 confer.

4 MR. WARIN: No, no, I actually meant with the Court.

5 THE COURT: With us right now.

6 MR. WARIN: Let me give you an example.

7 THE COURT: No, no, don't give me examples now.

8 MR. WARIN: All right.

9 MR. BUCKLEY: But I'm happy to --

10 (Laughter.)

11 MR. BUCKLEY: I'm happy to do that. We can talk
12 about it now.

13 THE COURT: See how far we can get.

14 Okay. All right. I'll bring the jury back at 11:00
15 tomorrow.

16 MR. BUCKLEY: Thank you, Your Honor.

17 MR. WARIN: Thank you, Your Honor.

18 THE COURT: Okay.

19 (End of sidebar.)

20 THE COURT: All right. We have some matters to
21 discuss, so rather than have you sit around for what's probably
22 a good half an hour, I'm going to release you for the day. And
23 as I said briefly the other day, I've got a docket tomorrow
24 morning starting at nine that will go until about, it may go
25 between 10:30 and 11:00. So I ask you to come back at eleven

1 tomorrow, and we'll continue hearing the testimony at that
2 time.

3 And just for your -- I know you're interest is that
4 defendants are close to completing their -- or will be close to
5 completing their evidence tomorrow and their defense of the
6 case.

7 We're not going to finish before next week, and as I
8 indicated before -- we're not going to finish this week, and as
9 I indicated, I'm still committed to going down to Richmond on
10 Monday. So we'll -- I'll have a better idea of what's going to
11 happen on Tuesday once we get through tomorrow's testimony, and
12 I'll let you know then.

13 All right. But you're excused at this time until
14 11:00 tomorrow, and please don't discuss the case or do any
15 investigation or research. Thank you very much. Have a good
16 evening.

17 (Jury out.)

18 THE COURT: Okay. Have a seat. So we have -- was
19 Mr. Bridges going to do that other argument on the sword and
20 the shield, or, Mr. Buckley, are you going to do that, or
21 Ms. Jobson?

22 MR. BUCKLEY: So, Your Honor, we are still trying to
23 gather the documents.

24 THE COURT: I thought Mr. Warin gave them to -- the
25 numbers --

1 MR. BUCKLEY: Well, he gave -- it was the numbers.
2 They're not all trial exhibits, and so we're having to pull
3 them by Bates number, but if he's got the copies, I'm happy to
4 just try to do it on the fly if you like.

5 THE COURT: Okay. Let's try, see how far we get.

6 Mr. Warin, why don't you -- I know you explained your
7 position partially with some documents, but why don't you start
8 over because I'm sure I missed something.

9 MR. WARIN: I'd be happy to, Your Honor. When
10 Mr. Cadenhead was testifying this morning, Mr. Bridges elicited
11 testimony from him with respect to Cox's dealings with other
12 media companies in terms of how many notices they had in and
13 how they were able to reach agreements with them, and
14 everything was copacetic with that other group of rights
15 holders, who were also sending in notices to Cox with respect
16 to infringement of their rights.

17 During the course of discovery -- and so he --

18 THE COURT: Mr. Bridges is now here. We just
19 started, Mr. Bridges --

20 MR. BRIDGES: Great. Thank you, Your Honor.

21 THE COURT: -- and your colleague was good enough to
22 say he'd do the best that he could until you came.

23 MR. WARIN: So that testimony was elicited, and it
24 was beyond anything we'd talked about with respect to ahead of
25 time -- with respect to Mr. Cadenhead's testimony. As you

1 know, we had no objection to his testifying about his dealings
2 with Mr. Steele or with Rightscorp, but this is dealing with
3 others, and these -- some of the documents we were provided,
4 beginning with No. BMG 0208754, they're a series of multiple
5 documents, and they begin, for example, on September 13, 2010,
6 the time period that Mr. Cadenhead was talking about, and
7 there's a notice here from Marianne Grant from the Motion
8 Picture Association of America to Mr. Cadenhead about the,
9 quote, current notice program, and it indicates that she is
10 representing apparently Fox, NBC, Paramount, Warner, RIAA --
11 which is the Recording Industry of America -- Disney, and Sony,
12 and there were multiple correspondence internally, e-mails back
13 and forth between Mr. Cadenhead and Mr. Zabek, between
14 Mr. Cadenhead and Cox Abuse, between Mr. Cadenhead and Mr. Beck
15 and Mr. Sikes and others, and Mr. Cadenhead and Mr. Beck, all
16 of which are redacted and privileged.

17 And so the topic is being discussed about what
18 they're going to do with notices from other rights holders.
19 Mr. Cadenhead testified about that this morning, yet during
20 discovery, all of those were withheld on the basis of
21 privilege, and so that's why I made the notion sword-shield.

22 Now, there's another exhibit --

23 MR. BUCKLEY: Your Honor, just one thing: So this
24 particular document has a very unique technical issue with it
25 that's different than the other ones that I can explain if you

1 like.

2 THE COURT: Let Mr. Warin finish, and then you can
3 address them.

4 MR. WARIN: So about that same time, there is an
5 e-mail to Mr. Cadenhead from Victoria Sheckler from the
6 Recording Industry Association of America with copies to
7 others. It's about the Cox graduated response program, and she
8 is talking about how many notices the industry, this is the
9 industry, RIAA will get, and she talks about the fact, quote,
10 our records indicate we have sent Cox on average 6,000 notices
11 per month. This is in 2010.

12 And then there's an e-mail from Mr. Cadenhead to
13 Mr. Beck and then an e-mail back from Mr. Beck to Mr. Cadenhead
14 on that same topic. It's part of the same string. Redacted.
15 So we have no idea as to what, if anything, was going on. Yet,
16 Mr. Cadenhead was allowed to testify to that.

17 Similar, there was an e-mail that is dated April 12,
18 2012. Actually, it begins -- let me go earlier, April 12,
19 2012, from Brent Beck to data ops CATS. "We have a hard limit
20 of 200 a day for Universal's complaints to us, but we have been
21 seeing quite a bit more than that coming in. In general, it
22 isn't really a big deal. We create closed tickets once the
23 limit is exceeded, but this complaint in particular has had
24 daily volumes as high as 3,700 plus. Does that seem excessive
25 to you?"

1 And then e-mail from Mr. Sikes: "Yeah, this does
2 seem excessive."

3 But in between, there are e-mails to Mr. Cadenhead,
4 to Mr. Sikes, Mr. Beck, all redacted on the basis of privilege,
5 all dealing with the same topic as to their hard cap, which he
6 testified to, about their dealings with other rights holders,
7 particularly those in the Motion Picture Industry, which he
8 testified about.

9 And then on another notice, April 15, 2013, actually
10 begins April 12, 2013, it's talking about the same topic. It's
11 talking about the notice limit, and there are five separate
12 e-mails back and forth between Mr. Cadenhead and others --
13 Ms. Trickey, Mr. Zabek, Mr. Sikes -- all redacted, although
14 it's clear from the first e-mail that they produced to us that
15 they're on that same topic.

16 And then finally, there's another one involving
17 Mr. Beck again having to do with some of the same topics.

18 So our concern is that Mr. Cadenhead, testimony was
19 elicited from him talking about how other people had some
20 notices, how many they were, and how they were very reasonable
21 in dealing with Cox, and they imposed hard limits, and then
22 they relaxed some of them, but virtually all of the e-mails
23 dealing with those topics that were contemporaneous at the time
24 internal within Cox were marked privilege and weren't provided
25 to us.

1 So that's the first topic. There's another one I'll
2 get to in a moment.

3 THE COURT: Okay.

4 MR. BUCKLEY: Can I use the documents? Because we
5 still haven't found --

6 MR. WARIN: You may.

7 MR. BUCKLEY: Thank you.

8 All right. So the first document is the one on the
9 front that says "Merged E-mail." Joe Sikes is one of the Cox
10 employees. He had a policy, which was his own policy, the way
11 he stored e-mail was he would periodically take all of the
12 e-mails in his inbox and merge them into a Word file. So this
13 is a document -- this actually isn't even the whole thing.
14 It's about 200 pages long, but what it is is a series of
15 e-mails between different people on different topics, all
16 merged together into one giant document.

17 Mr. Caracappa and I had 15 conversations probably
18 about this because it's a mess and it's hard for everybody to
19 deal with. So it's actually not true that all of these are
20 part of the same conversation, and that's why this particular
21 document is in a different category. I don't even know, I'd
22 have to go pull this and see what these different conversations
23 are about, but they're probably not even between the same
24 people. He literally took like a year's worth of e-mail and
25 pasted it into one Word file. So this one is in a different

1 category, and it's hard to assess what these things are without
2 looking at them.

3 THE COURT: That's what, September 2010?

4 MR. BUCKLEY: Well, I don't know. I don't even know
5 which one internally he was looking at. That's the September
6 one, September 2010. Okay.

7 Yeah. So the first one I'm looking at is a
8 conversation about somebody's wedding. You can look at it.
9 It's a whole bunch of different e-mails on different topics,
10 and unfortunately, it's just a function of the way these
11 e-mails were collected and produced.

12 THE COURT: Okay.

13 MR. BUCKLEY: With respect to the other e-mails, so
14 the -- we did not waive privilege for all purposes in this
15 case. As you know, we waived it for a very limited purpose,
16 which was to allow Mr. Cadenhead to talk about why he advised
17 rejecting the Rightscorp notices. There are lots of other --

18 THE COURT: I know. That's what Mr. Warin says the
19 problem is. If you had produced the documents, because you
20 knew Cadenhead was going to testify about how he handled other
21 copyright holders, then he wouldn't have a problem.

22 MR. BUCKLEY: Well, but, Your Honor, we didn't waive
23 privilege for all purposes. We have lots of documents that we
24 withheld on privilege grounds, just as they did. And we had a
25 discussion with Judge Anderson about this. They actually

1 brought a motion to expand the scope of the waiver. We
2 resisted that. He denied their motion, sided with us, and said
3 the waiver is like this and there are documents that are within
4 the waiver, but there are lots of documents we withheld on
5 privilege grounds.

6 So the issue here is did Mr. -- and I apologize, I
7 was not here for the testimony, but did Mr. Cadenhead say
8 something today about interactions with other rights holders,
9 which, of course, aren't privileged. How he's talking to the
10 Motion Picture Industry or Universal, those aren't privileged
11 communications.

12 THE COURT: Right.

13 MR. BUCKLEY: Did he say something about that that
14 implicated legal advice or implicated something that we've
15 withheld as privilege and that we're trying to use as a sword,
16 because that's the issue, right? He's afraid that there's
17 something we have shielded that we're now trying to use as a
18 sword. We suspect that didn't happen.

19 THE COURT: What Mr. Warin is saying is that there
20 may be inconsistencies between what he's said in privileged
21 documents and what he said on the stand, and BMG can't test
22 that because they don't have those documents, right?

23 MR. WARIN: Yes.

24 THE COURT: He's not quarreling with whether there
25 was a privilege -- he doesn't -- I don't think he believes that

1 there's any documents that were withheld between Mr. Cadenhead
2 and MPAA or RIAA. It's what did he say internally about them
3 which might be inconsistent, right?

4 MR. WARIN: That's correct, Your Honor.

5 MR. BUCKLEY: I think that's right, but again, we
6 only have -- that's true on all sorts of communications, right?
7 There are privileged things that both sides have withheld that
8 the other side doesn't get to see.

9 THE COURT: That's the shield and the sword.

10 MR. BUCKLEY: Right. But you only have the sword and
11 shield problem if we're trying to use something as a sword,
12 something that we shielded. So if all he talked about today
13 was the facts of communications he had with third parties that
14 are not privileged, then --

15 THE COURT: That's the sword. That's damaging to
16 BMG's theory that Cox ignored all of the notices and goes to
17 your -- it helps your case, right? So isn't that the shield --
18 isn't that the sword?

19 The shield is BMG can't test the accuracy of the
20 testimony because it doesn't have the documents because you
21 shielded them from production. That's the way my brain works,
22 so tell me where I'm wrong.

23 MR. BUCKLEY: I think that is the argument, but
24 again, I think where it breaks down is if he's just testifying
25 about facts, about interactions with third parties, then where

1 is -- what I'm having trouble seeing --

2 THE COURT: Isn't that why we have a court? Isn't
3 that why we have a jury, is to determine issues of fact and
4 what's the truth and what's not?

5 MR. BUCKLEY: But is the -- so is the idea that --
6 and again, I'm just going blank, you're right, I haven't seen
7 the documents -- but if the idea is he said, I have this
8 conversation with the Motion Picture Industry, and then he's
9 got an e-mail internally where he e-mails Joe Sikes and says, I
10 didn't have a conversation with the Motion Picture Industry?

11 THE COURT: He said, I told him that we're going to
12 work with them, they complained, I have no intention of doing
13 anything, I said to them, we're going to screw them just like
14 we're screwing everybody else, you know, hypothetically.

15 MR. BUCKLEY: Hypothetically, right.

16 THE COURT: So that's, that's what BMG wants to test,
17 and they can't do that.

18 MR. BUCKLEY: So if it's specific to the documents
19 he's identified, what we can do -- we may already have some of
20 them. We can get you unredacted versions, and you can look at
21 them.

22 THE COURT: Let's identify them and see whether
23 they're, in fact -- that you've claimed privilege on relevant
24 documents. That would be the place to start.

25 MR. BUCKLEY: And I guess the question is how far

1 along are we in finding the unredacted versions?

2 MS. JOBSON: I have now -- I'll stand up.

3 Sort of mid-project, but I think we've got printouts
4 of the redacted versions and the unredacted versions, and I'm
5 going through the exercise where I'm putting brackets in blue
6 on the unredacted versions of the portions that had been
7 redacted.

8 THE COURT: Okay.

9 MS. JOBSON: I could probably finish that in the next
10 ten minutes or so.

11 THE COURT: That's wonderful.

12 MS. JOBSON: I'll carry on.

13 MR. BUCKLEY: Some dinnertime reading for you?

14 THE COURT: Yeah, absolutely.

15 All right, Mr. Warin, issue No. 2.

16 MR. WARIN: And, Your Honor, we weren't -- I think
17 it's understood we weren't claiming that they falsely asserted
18 privilege.

19 THE COURT: No. It's just that now that this
20 testimony came out, it changes, you know, that's -- trials are
21 all about moving parts.

22 MR. WARIN: And even if we were to get the documents
23 now, he's gone.

24 THE COURT: He's gone, right.

25 MR. WARIN: He's been released.

1 THE COURT: We haven't talked about the remedy if it
2 turns out to be a problem.

3 MR. WARIN: Right. The second one is there is an
4 e-mail dated August 5, 2010, and you may recall that
5 Mr. Cadenhead testified about a speech that he gave about how
6 successful Cox had been in terms of handling the notices and
7 they'd been successful in 97 percent of the time. This is an
8 issue that Mr. Allan raised earlier.

9 THE COURT: 96.

10 MR. WARIN: 96, as to whether or not the foundation,
11 and he said that took place sometime, the information was
12 gathered sometime in 2010.

13 There's an e-mail that was produced in 2010,
14 August 5, that it's from Mr. Cadenhead, and it's to the Abuse
15 Team, and it is entitled "DMCA statistics," "DMCA statistics."
16 "Brent pulled these stats for me. I thought they'd be of
17 interest to the general group. We will likely see more than
18 million notices this year."

19 So that's the beginning of the thing, and then you go
20 down the string, and the next e-mail is marked privileged for
21 Mr. Cadenhead, and then two full pages that we can't even see
22 what's on them marked privileged, and then an e-mail from
23 Mr. Beck to Mr. Cadenhead with the same caption, "DMCA" -- it's
24 all part of a string, "DMCA Statistics," again, marked redacted
25 for privileged, and then another one later on that same day,

1 "DMCA Statistics," redacted for privilege, and then finally
2 another one at 4:21 that day, "DMCA Statistics."

3 So we were allowed to hear the testimony from
4 Mr. Cadenhead, who himself didn't gather the statistics, didn't
5 have the foundation for gathering it, but he was still allowed
6 to give the testimony because he gave a speech in 2010, but our
7 ability to cross-examine him --

8 THE COURT: I let it in because he's monitoring the
9 statistics.

10 MR. WARIN: All right. Fair enough.

11 THE COURT: And it's part of his responsibility, so I
12 thought it was close enough where he should be allowed to
13 testify about it.

14 MR. WARIN: Understood, Your Honor. But the
15 beginning of this e-mail is on that same topic, which is the
16 statistics, and they're asserting privilege after privilege
17 after privilege and not allowing us to get the underlying data.
18 We don't even get the attachment that had the statistics at the
19 same time that he's testifying on the 96 percent.

20 THE COURT: All right. So the same argument. Do you
21 want to find it and see if there's a problem?

22 MR. BUCKLEY: We'll find it. And if we can find the
23 attachment, we'll do that too. We produced 40,000 documents,
24 so it's possible they got separated. We'll find it.

25 THE COURT: All right. You find it. Great.

1 MR. BUCKLEY: I'm sorry, can we get the document
2 number again?

3 MR. WARIN: Sure. Actually, I think I may have a
4 copy of this one.

5 MR. BUCKLEY: Thank you.

6 THE COURT: That can be homework for you.

7 MR. WARIN: This is the one I gave you earlier.
8 That's another copy of the same one I gave you earlier.

9 MS. JOBSON: We want an attachment for this one?

10 MR. BUCKLEY: If there is one.

11 Thank you.

12 MR. WARIN: Thank you.

13 THE COURT: All right. And we can take this up in
14 the -- if -- you know, get it to me when you can get it to me.
15 You know, I'll be here for a couple hours, but if not, get it
16 to me in the morning.

17 MR. BUCKLEY: Thank you. Yeah, because if we leave
18 now, Your Honor, we may not be able to get back in.

19 THE COURT: You won't get back in, you're right.

20 MR. BUCKLEY: Ms. Jobson has some of it now that we
21 can give to you.

22 THE COURT: Okay. Yeah, I'm happy to take whatever
23 you have now, and I'll look at it tomorrow morning. I'll look
24 at the rest of it. That's fine. That's not a problem.

25 Okay. So the exhibits for Sullivan, you haven't had

1 a chance to go through them, but you had talked about
2 possibly -- was that, was that -- those are the two matters you
3 wanted to discuss, Mr. Warin?

4 MR. WARIN: Yes. And I think since we just got these
5 and I haven't really studied them, we probably should meet and
6 confer on the exhibits and demonstratives.

7 THE COURT: Okay.

8 MR. WARIN: But I do think there's some issues that
9 we can get out of the way today --

10 THE COURT: All right.

11 MR. WARIN: -- which has to do with the scope of his
12 testimony.

13 I have Dr. Sullivan's report here in front of me, and
14 I just want to make sure that we don't get in trouble tomorrow
15 when he starts testimony. And this doesn't have to do with the
16 exhibits, but it has to do with the scope of his testimony.

17 On page 3 of his report under methodology, and it
18 continues onto page 4, Dr. Sullivan states, "I understand" --

19 MR. BUCKLEY: Just a second. Your Honor?

20 THE COURT: Yes.

21 MR. BUCKLEY: Dr. Sullivan is in the courtroom.

22 THE COURT: Oh.

23 MR. BUCKLEY: Would you mind going out, please, sir?

24 MR. WARIN: Thank you. Sorry.

25 THE COURT: Yeah, thank you, Mr. Buckley.

1 For future reference, Dr. Sullivan, when somebody
2 starts discussing your report and you're sitting in the back
3 and you haven't really been identified, volunteer the fact that
4 you're here so -- because there are some courts where if there
5 had been a rule on witnesses and you sat in there without
6 saying anything and nobody saw you, an irascible judge might
7 disqualify you from testifying. So it can be -- depending on
8 where you are, it can be a really important issue.

9 All right, sir?

10 DR. SULLIVAN: Very good. Thank you.

11 THE COURT: All right. Thank you.

12 MR. WARIN: I'll begin again, Your Honor. On page 3
13 of Dr. Sullivan's report under 1.3, methodology, and it
14 continues through page 4, Dr. Sullivan is giving legal
15 opinions. "I understand that in copyright infringement
16 litigation, copyright law provides for damages to a prevailing
17 party in one of two ways."

18 Then he goes on and gives the one of two ways, which
19 we don't agree with in terms of his statement.

20 On the next page he states, "For statutory damages, I
21 understand that copyright law provides a range of values and
22 leaves the court the discretion to determine the just amount,"
23 and he talks about calculating injury to the copyright holders
24 as the proper measure and cites a half a dozen cases, legal
25 decisions.

1 Again, we don't agree with that. That's something
2 that's going to come up in the charging conference, and I just
3 wanted to make sure we didn't get on a slippery slope with
4 Dr. Sullivan tomorrow testifying as a lawyer as to what the law
5 is when he's not been qualified as that. So that's the first
6 issue.

7 The second issue has to do with later on in his
8 report, on page 17 and 18. He starts giving what I would call
9 engineering or technical testimony with respect to spoofs,
10 decoys, corruptions, and then he talks about the unreliability
11 of the Rightscorp system and the unreliability of the
12 fingerprint system, and the question as to whether or not the
13 music is authorized, and for all of that testimony, if you look
14 at footnotes No. 75, 76, 79, 80, 81, 82, 83, 84, he relies upon
15 interviews with Mr. Rosenblatt.

16 No. 1, I believe they are beyond the scope of his
17 expertise. No. 2, he's relying upon Mr. Rosenblatt to give
18 technical testimony as to how the Rightscorp system works.
19 It's inappropriate testimony for an economist, and so I just
20 don't want to be sitting here tomorrow starting to hear that
21 testimony and having to jump up. That's why I wanted to raise
22 it tonight.

23 THE COURT: Okay.

24 MR. BUCKLEY: Your Honor, Dr. Sullivan will not give
25 legal testimony, obviously. He provided some background, and I

1 think he should at least be able to say, I calculated actual
2 damages because I understand that might be related to the
3 statutory damages inquiry, but he's not going to talk about
4 copyright law. I'm not going to ask him about cases.

5 And on the technical stuff, I'll look at these
6 footnotes. I don't have his report with me. I'll look at
7 them. He's not going to talking about BitTorrent. They've
8 heard plenty about that. I don't think he's going to get into
9 areas that even relate to Rosenblatt's report that I can think
10 of right now, but I'll look at that. I understand the concern.

11 THE COURT: Okay. I think that's very wise. I don't
12 think that testimony is admissible from him. The legal is
13 clearly not. I mean, you can ask him a hypothetical which says
14 if you were, you know, if he were instructed to identify actual
15 damages, do you have an opinion on whether that's possible in
16 this case, and do it that way. I think that's permissible
17 under the rules.

18 MR. BUCKLEY: Certainly. And I may be able to do
19 that without even having to mention statutory damages. It
20 doesn't really matter. He was here to do an actual damages
21 calculation, and we can argue from that later.

22 THE COURT: All right.

23 MR. BUCKLEY: So I'll be careful.

24 THE COURT: Okay. Good.

25 And then you guys are going to look at the --

1 MR. WARIN: We will meet and confer on the actual
2 exhibits and the demonstratives. We do have -- let me just
3 highlight. I'll give Mr. Buckley a highlight as well. There
4 is a chart in the demonstratives that -- here it is here. It
5 has assumptions, and the first assumption is with a big
6 question mark: "BMG owns copyrights to all the works at
7 issue?" That's not a question mark. The Court's decided that.
8 To allow that demonstrative to be displayed to the jury
9 suggests there is a question about that when there isn't. This
10 is just one I happened to spot when I was going through.

11 MR. BUCKLEY: The question marks are coming out.

12 THE COURT: Okay. That's a good idea. Good. All
13 right. Well, continue to work on that.

14 MR. WARIN: And is it correct we just have two more
15 witnesses?

16 MR. BUCKLEY: I believe so, Dr. Sullivan and
17 Mr. Mencher. Not seeing my client here, I'm a little worried
18 about getting out over my skis, but I think that's true, and we
19 are really hoping to be done tomorrow.

20 THE COURT: Okay. Then Tuesday morning, we'll do any
21 rebuttal case. We'll keep it to a focused rebuttal case and
22 try and get this case to the jury on Tuesday.

23 That -- which reminds me that we haven't talked about
24 jury instructions --

25 MR. BUCKLEY: I was just going to ask.

1 THE COURT: -- and I'm going to give you the weekend
2 to -- I mean, I use O'Malley instructions for general
3 instructions. There are by my count, you know, four or five at
4 least instructions which are specific to the infringement, and
5 I have looked at your instructions, and I realize you've got
6 some differences there.

7 So what I need for you to get me by, you know,
8 Monday, I'll be back from -- hopefully, I'll be back from
9 Richmond mid-afternoon. I'd very much appreciate your legal
10 positions in a short memo, you know, as detailed as you want to
11 make it, citing the case law that you believe supports your
12 position, and then we'll still have a jury instruction
13 conference, which I hope won't -- you know, where we can, where
14 we can talk about why somebody's right and somebody's wrong.
15 I'll give you certainly the opportunity to make sure the record
16 is clear that you have preserved objections, and we'll do
17 that -- I guess we'll do that Tuesday, and I'll rule on that,
18 and then we'll go into closing arguments. Okay?

19 Mr. Reilly?

20 MR. REILLY: Yes, Your Honor. With respect to the --
21 any written positions on the jury instructions, if I can speak
22 from here?

23 THE WITNESS: Yes.

24 MR. REILLY: Would you like those filed on the ECF
25 system as well as delivered to chambers?

1 THE COURT: Yes, absolutely.

2 MR. BUCKLEY: And by what time would you like, Your
3 Honor?

4 THE COURT: You know, I won't be back from Richmond
5 until two. So if you can get it to me by two, and everybody
6 working on the case is here in the courtroom, so we probably
7 won't -- well, no, we'll be tied up. So -- but if you can get
8 it to me by two on Monday, that will be great. Okay?

9 All right. Anything else we need to talk about?

10 MR. WARIN: Not that I'm aware of, Your Honor.

11 THE COURT: Okay. Ms. Jobson?

12 MR. BUCKLEY: Your Honor, are you going to limit the
13 time for closing?

14 THE COURT: Ten minutes apiece.

15 (Laughter.)

16 MR. BUCKLEY: Just going to click through 200 slides
17 as fast as we can.

18 THE COURT: Nothing I've done trying to limit the
19 testimony has worked, so why would I start now?

20 (Laughter.)

21 THE COURT: How much do you want? I mean, you may
22 not know that at this stage. You've got the weekend to think
23 about it, but they shouldn't be any longer than the openings,
24 you know, an hour.

25 MR. WARIN: I was thinking maybe 15 minutes longer

1 than the opening?

2 MR. BUCKLEY: Yeah, maybe.

3 THE COURT: Seventy-five minutes apiece, really?

4 MR. WARIN: Yeah.

5 THE COURT: Okay. You will risk losing the jury,
6 unless you're in really spellbinding form.

7 MR. WARIN: That seldom happens recently, at least
8 recently. It used to, but not so much any more.

9 THE COURT: Judge Trenga is -- recalls your dear days
10 together fondly, so he --

11 MR. WARIN: That was back when I could cast a spell,
12 Your Honor.

13 THE COURT: Well, yeah. All right. If you need 75
14 minutes, take 75 minutes.

15 And you want to preserve some of that?

16 MR. WARIN: Yeah.

17 THE COURT: Total.

18 MR. WARIN: I'll have to save some if I want it. If
19 I use it all up, I'm done.

20 THE COURT: Okay.

21 MR. BUCKLEY: Could we ask one last question on the
22 closing?

23 THE COURT: Yes, sir.

24 MR. BUCKLEY: We had contemplated having
25 Mr. Wakefield handle liability and I might handle damages. Is

1 that okay?

2 THE COURT: Yeah, that's fine.

3 MR. BUCKLEY: Okay. Thank you.

4 THE COURT: Absolutely. All right, anything else
5 tonight?

6 (No response.)

7 THE COURT: All right, thank you-all. We'll see you
8 tomorrow. Like I said, I hope I'm out -- I'm done at 10:30,
9 and so maybe at 10:45 we can plan on handling any of these
10 issues that arise from the slides. Okay?

11 MR. WARIN: Thank you, Your Honor.

12 MR. ALLAN: Thank you, Your Honor.

13 MR. BUCKLEY: Thank you.

14 THE COURT: All right. Good. Have a good evening.
15 We're in recess.

16 (Recess from 5:18 p.m., until 10:45 a.m., December 11, 2015.)

17

18 CERTIFICATE OF THE REPORTER

19 I certify that the foregoing is a correct transcript of
20 the record of proceedings in the above-entitled matter.

21

22

23

/s/

Anneliese J. Thomson

24

25